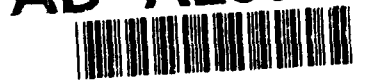
AD-A259 355



0

THE CONSTITUTION AND NATIONAL SECURITY

DTIC
ELECTE
JAN1 4 1993
S E D

STRIBUTION STATE
Approved for public release
Distribution Unlimited

The cover of this book is adapted from *The Scene at the Signing of the Constitution*, a 1944 painting by Howard Chandler Christy. The painting is part of the United States Capitol Art Collection and is used here with the permission of the Architect of the Capitol.

BEST
AVAILABLE COPY

Accesion For
NTIS CRA&I
DTIC TAB
Unannounced
Justification per BPO
By
Distribution /
Availability Codes
Dist | Avail and / or Special
A-1

DTIC QUALITY INSPECTED 5

DTIC
ELECTE
JAN1 4 1993
S E D

THE CONSTITUTION AND NATIONAL SECURITY

A BICENTENNIAL VIEW

Edited by
Howard E. Shuman
and
Walter R. Thomas

Introduction by
Senator Edmund S. Muskie

93-00016

NATIONAL DEFENSE UNIVERSITY PRESS
Fort Lesley J. McNair
Washington, DC

92 1 04 048

National Defense University Press Publications. To increase general knowledge and inform discussion, NDU Press publishes books on subjects relating to US national security. Each year in this effort, the National Defense University, through the Institute for National Strategic Studies, hosts about two dozen Senior Fellows who engage in original research on national security issues. NDU Press publishes the best of this research. In addition, the Press publishes especially timely or distinguished writing on national security from authors outside the University, new editions of out-of-print defense classics, and books based on conferences concerning national security affairs.

"The Power of the Purse," by Robert F. Turner is copyrighted and printed here by permission of the author. Material in this publication that is not copyrighted may be quoted or reprinted without permission. Please give full publication credit.

Opinions, conclusions, and recommendations expressed or implied within are solely those of the authors and do not necessarily represent the views of the National Defense University, the Department of Defense, or any other Government Agency.

William H. Palmer, Jr., Cheltenham, Maryland, proofread the page proofs of this book under contract.

NDU Press publications are sold by the US Government Printing Office. For ordering information, call (202) 783-3238, or write to: Superintendent of Documents, US Government Printing Office, Washington, DC 20402.

Library of Congress Cataloging-in-Publication Data

The Constitution and national security: a bicentennial view / edited by Walter R. Thomas and Howard E. Shuman ; introduction by Edmund S. Muskie.
p. cm.
Papers from a conference held by the National Defense University. $13.00 (est.)
1. United States—National security—Law and legislation—Congresses. 2. United States—Foreign Relations—Law and legislation—Congresses. 3. Separation of powers—United States—Congresses. I. Thomas, Walter R. II. Shuman, Howard E. III. National Defense University.
KF7209.A2C66 1990
342.73'0418—dc20
[347.302418] 89-13412
CIP

First printing, April 1990

BEST
AVAILABLE COPY

In memory of Edwin Timbers

CONTENTS

Foreword xiii

Preface by Howard E. Shuman xv

Introduction by Senator Edmund S. Muskie xxi

PART I DIVIDING CONSTITUTIONAL POWERS

WHITE HOUSE DECISIONMAKING 3
Paul Anderson

THE INTELLECTUAL LEGACY OF OUR CONSTITUTION 13
Gregory D. Foster

FOREIGN POLICY AND CONGRESSIONAL PRESIDENTIAL RELATIONS 37
Robert Jervis

NATIONAL SECURITY—SHARED AND DIVIDED POWERS 55
Howard E. Shuman

THE POWER OF THE PURSE 73
Robert F. Turner

THE CONSTITUTION, CONGRESSIONAL GOVERNMENT, AND THE IMPERIAL REPUBLIC 97
Robert S. Wood

PART II THE EVOLUTION OF THE PRESIDENCY

PRESIDENTIAL POWERS AND NATIONAL SECURITY 117
Larry Berman

CAN THE PRESIDENT LEAD? 135
George C. Edwards III

EXECUTIVE PREROGATIVES, THE CONSTITUTION, AND NATIONAL SECURITY 163
Joseph E. Goldberg

PRESIDENTIAL TRANSITIONS AND NATIONAL SECURITY ISSUES 183
James P. Pfiffner

CONGRESS, NATIONAL SECURITY, AND THE RISE OF THE "PRESIDENTIAL BRANCH" 201
Nelson W. Polsby

INSTITUTIONALIZATION, DEINSTITUTIONALIZATION, AND LEADERSHIP 211
Bert A. Rockman

PART III THE CONSTITUTION AND FOREIGN POLICY

THE WAR POWERS RESOLUTION 233
John C. Culver

THE LEGITIMACY OF THE CONGRESSIONAL NATIONAL SECURITY ROLE 243
Louis Fisher

FOREIGN POLICY AND THE ECONOMIC WORLD ORDER OF THE 1990s 259
Gerald Garvey

NUCLEAR DEFENSE POLICY: THE CONSTITUTIONAL FRAMEWORK 281
Louis Henkin

THE WAR POWERS RESOLUTION: CONGRESS VERSUS THE PRESIDENT 301
Morris S. Ogul

NATIONAL SECURITY AND THE UNITED STATES JUDICIARY 317
C. Herman Pritchett

THE CONSTITUTIONALITY OF STRATEGIC PLANNING 333
George H. Quester

LEGAL LESSONS IN NATIONAL SECURITY 357
Edwin Timbers

Appendix: Excerpts of Articles I and II of the Constitution 377

FOREWORD

THE FOUNDERS OF OUR REPUBLIC WERE DETERMINED TO establish a government that protected the rights of the individual within a free society, a system that improved upon European designs. Newly independent, the Americans formed a government under the Articles of Confederation. As a loose confederation of states, however, the growing nation had a weak national voice and little international status. After only ten years under this system, the states recognized the need for more national power and drafted the US Constitution.

The goal, again, was to protect the individual's natural rights through the creation of an energetic national government. Thus the US Constitution was written, with compromises, and submitted to the people for their ratification. After vigorous public debate, this document became the fundamental law of the land.

The Constitution has endured with few additional amendments for more than two centuries—but not without continuing debate. In this newest contribution to the writings of constitutional scholars, papers address the President's war powers, the role of Congress in foreign policy, and other questions of interpreting the Constitution in the modern era. These current issues have at their core the same fundamental questions that animated debate during the Constitutional Convention in 1787: how best to protect society while guarding the rights of the individual, how best to give sufficient power to the executive while guarding against abuse of power. But even as we debate, we celebrate our Constitution, a document forged of ingrained American beliefs that our republic can be secured *and* the rights of the individual safeguarded.

J. A. BALDWIN
VICE ADMIRAL, US NAVY,
PRESIDENT, NDU

PREFACE

AFTER TWO CENTURIES OF DEBATE AND INTERPRETATION, the fundamental conflict established by the US Constitution among the three branches of American Government is alive and well. As the papers in this volume attest, perhaps in no other area is that conflict so persistent than in national security.

In the words of Edward S. Corwin, the US Constitution is not only "an invitation to struggle"[1] among the Congress, the President, and the Courts for the privileges of directing American foreign policy, but an invitation for them to struggle over all aspects of national security issues.

History has molded, converted, and expanded the powers and institutions of the American Government. As Justice Oliver Wendell Holmes wrote in *The Common Law*, "The life of the law has not been logic; it has been experience."[2] And it was the 180 years of the American Colonial experience preceding the adoption of the Constitution that influenced the Founding Fathers.

Many of the same issues that confronted those men at Philadelphia are contentious today. How long should the President serve? Should he be limited to two four-year terms or one six-year term or no limit at all? What is the role of the President as Commander in Chief? Is it an office or a power? What is the proper use of the veto? Should the President's authority be expanded by a line-item veto that might result in more control over appropriations? Does the President have the right to appoint his own people to serve him, or must they be subjected to intense examination by the Senate? What is the power of the President over treaties? Argument about the President's authority over—and interpretation of—treaties has forever been an irritant in our history of negotiations.

The nineteenth century was essentially dominated by Congress. Its enumerated powers guaranteed supremacy for that branch of our government. These powers are so detailed and specific, as opposed to the vague and often illusory powers granted to the President, that for more than a hundred years there was little argument over their interpretation. Even when Lincoln exercised prerogative power during the Civil War, he did so in the name of Congress.

> These measures, whether strictly legal or not, were ventured upon under what appeared to be popular demand and a public necessity ... trusting that Congress would readily ratify them. It is believed nothing has been done beyond the constitutional competency of Congress.[3]

Congress then ratified his actions in the language of an Appropriations Act "... as if they had been issued and done under the previous express authority and direction of the Congress of the United States."[4]

If the nineteenth century was the century of the Congress, the twentieth century is that of the President. The earlier logic was turned on its head. It was argued that the detailed and specific powers assigned to Congress were by their nature limited and that the vagueness of the powers allotted to the President could be expanded virtually without let or hindrance. These powers were like empty vessels waiting to be filled. Theodore Roosevelt put it most clearly:

> I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless some action was forbidden by the Constitution or by the laws.[5]

The onset of World War I, the Great Depression, World War II, and the postwar threat of the Soviet Union brought an expansion of Presidential power. In some quarters, this expansion was either strongly opposed or grudgingly acknowledged. In others,

particularly among academics and New Dealers, it was welcomed enthusiastically by Presidential-power advocates, who canonized the President while denigrating the Congress. The result today is that the public, as well as politicians and pundits, generally accepts the powerful modern Presidency as a necessary force in a dangerous world.

In some areas, however, opinion has gone well beyond mere acceptance. There is an even larger group who subscribe to the presumptions of Theodore and Franklin Roosevelt and assert a *sovereign* role for the President—which the division of constitutional powers was designed to prevent. This group claims the President's prerogative permits him to go to war, determine the meaning of a treaty, and even act as the *sole* organ of the Federal Government in the field of foreign policy. They have, in Patrick Henry's famous phrase, "squinted towards Monarchy."

When one compares the symbols and substance of modern Presidential power with that of our early presidents, the differences are striking. Who could have foreseen the pomp and circumstance of the modern Presidential inauguration costing millions of dollars and rivaling a coronation? Compare this with Jefferson's act of walking to the Capitol from his rented rooms nearby to take the oath of office in a simple and unassuming ceremony. Contrast Washington's journey by horseback to New York City with the use of Air Force One. Also consider the insulation of the modern President, surrounded by Secret Service agents and protected from the citizenry, with the routine practice of President Polk who spent several mornings each week greeting visitors, Congressmen, and office seekers who dropped by the White House to see him without appointment.

Campaigns for the Presidency now start at least two years before an election. Compare the plethora of primaries and caucuses, the expenditure of millions, and the culmination of it all by the nomination of candidates at a televised national convention, with the front porch

campaign of William McKinley when the public visited the candidate at his home.

Most important, consider the influence the President now has over legislation and public policy through the three major media events at the beginning of each year: the State of the Union message to the Congress, the release of the President's budget, and the publication of the President's *Economic Report*. Every fourth year the President adds the inaugural address to his quiver of policy weapons. As a result, the President is viewed as the "chief legislator."

Finally, consider the growth of the White House staff and the institutions of the Executive Office, including the power of the Assistant to the President for National Security Affairs, the Director of the Office of Management and Budget, and the Director of Central Intelligence, all of whom come under the President's aegis. Nelson Polsby refers to this as the "Rise of the Presidential Branch," a fourth branch of government.

All these comparisons demonstrate the remarkable growth in the power and importance of the Chief Executive over the course of our nation's history, especially during the twentieth century. While most agree that the President's power has grown, not everyone feels that this growth has been a positive development. The Congress (and to a lesser extent the Courts), for example, in order to cope with this vast array of Presidential resources, has added staff members, committees, and institutions to compete with the executive branch. In addition to the congressional budget process, there is now a Congressional Budget Office, Budget and Intelligence Committees, budget and policy experts in the Congressional Research Service of the Library of Congress, and comparable congressional specialists in the Office of Technology Assessment. Additionally, press and public relations experts are attached to congressional offices and the Supreme Court. Could Chief Justice Marshall, Senator Henry Clay, President Madison, or even the redoubtable Alexander Hamilton ever have contemplated such

grandiose Federal institutions as we have today, employing over three million people?

* * *

The bicentennial celebration of the US Constitution provided a fitting occasion to examine the numerous constitutional issues and concerns that affect national security. In a symposium sponsored by the National Defense University, representatives of the branches of government, as well as scholars from the private sector, met to discuss the US Constitution and national security. Many thoughtful papers were presented. When the opportunity arose to publish a book based on the symposium, the best of the articles were selected and edited to highlight the most innovative ideas and unique viewpoints of the distinguished conferees.

With one or two exceptions, the articles in this book cannot be placed easily under a single rubric. Most concentrate on the fact that more than one branch of government is involved in the national security activities discussed by the authors. In addition, many refer to the War Powers Resolution, and a few to the intrabranch concerns of the Iran-contra affair, which was so timely during the celebration of the constitutional bicentennial.

There are valuable insights in each of the articles. From these views, opinions, or predilections, we can be certain that the debates will go on. The issues—so well explored in these essays—are nevertheless complex and fundamental constitutional matters that will continue to concern us into the distant future. They are rightly visited during the celebration of the two hundred-year anniversary of our Founding Fathers' living masterpiece.

HOWARD E. SHUMAN

Notes

1. Edward S. Corwin, *The President: Office and Powers, 1787-1957*, 4th rev. ed. (New York: New York University Press, 1957), p. 171.

2. Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, 1923), p. 1.

3. James Richardson, ed., *The Message and Papers of the Presidents, 1789-1897* (Washington, DC: Government Printing Office), 7:3215-3519.

4. *Appropriations Act of August 6, 1861*, 12 U.S. Stat., 326.

5. *Theodore Roosevelt, An Autobiography* (New York: Charles Scribner's Sons, 1931), p. 388.

INTRODUCTION

By Edmund S. Muskie

THE CONGRESSIONAL ROLE IN NATIONAL SECURITY POLICY is not an easy subject to discuss dispassionately. Two caricatures dominate our periodic debates over the powers of the President and the Congress in this arena.

One caricature is the Congress as a disparate collection of 535 back-seat drivers and pseudo-Secretaries of State. The other caricature is a seriously misguided President, by virtue of some deeply flawed personality trait, abysmally poor advice, or lack of understanding, maneuvering the nation into a damaging situation that requires congressional extrication. We Americans love to overdraw these caricatures; political cartoonists and talk show hosts have put their children through college by dwelling on them. Unfortunately, these popular images have some basis in fact; otherwise, they could not be so widely held.

Most of my years in public service have been spent in the Congress, so it will come as no surprise to any that I am broadly sympathetic with the prerogatives of the legislative branch on the subjects of arms control and war powers, which I will discuss later. But I also acknowledge troubling abuses of the congressional role in national security policy. I wince when I read that the United States Senate recently adopted 86 amendments to the Department of State Authorization bill, ranging from the merger of embassies in the Caribbean to the closure of the United Nations office of the PLO. I am also troubled by growing individualism in Congress and the decline of

The Honorable Edmund S. Muskie is the former Senator from Maine and Secretary of State.

party discipline. Today, it's relatively easy for Members of Congress to develop their own political identity, independent from that of their party. All that's required is an immodest amount of financial and intellectual resources and ready access to the media.

When I ran for Governor of the state of Maine in 1954, my campaign cost a whopping $18,000. Today, the race costs one million dollars for each of the major party candidates. The same is true for many seats in the House of Representatives, across the country. Some House districts and virtually every Senate seat cost several times this amount. This growing commercialization and cost of political campaigns have many injurious effects and not just in our domestic affairs. I am sure that many good men and women have forsaken careers in public life because of the burdensome and demeaning nature of fund-raising that has become so central to our current political culture.

Criticism of the role of Congress is often linked to the perception that as money has become increasingly important in politics, Congress has become even more fragmented. Capitol Hill watchers often talk wistfully about the giants who conducted the nation's business in the sixties and seventies — including Senators on the foreign relations committee with whom I was honored to serve , like Jacob Javits, Clifford Case, Mike Mansfield, and J. William Fulbright. I, too, believe that these men were truly distinguished legislators, but I also recall that they were often belittled back then for their efforts to restrain Presidential power. I am struck by how many highly capable people continue to run for public office and to serve our country today—on the whole, current Members of Congress are as bright and industrious as their predecessors.

Today's congressional leaders are not lesser men than the giants Presidents turned to for bipartisan support during previous periods of national crisis. But they are lesser figures on Capitol Hill because their authority as leaders has been diluted.

Presidential leadership has also been badly diluted over the past quarter-century. Before President Ronald Reagan was reelected, it was fashionable to talk about a succession of failed and weakened presidencies due to the corrosive effects of the war in Vietnam, the Watergate affair, and the hostage taking in Iran.

Americans, regardless of political affiliation, hoped that President Reagan would change this pattern. And for a time, particularly after his overwhelming reelection victory, it appeared that he would. In a mid-1986 cover story, "Yankee Doodle Magic," *Time* magazine gave out plaudits, "Ronald Reagan has found the American sweet spot. The white ball sails into the sparkling air in a high parabola and vanishes over the fence, again. The 75-year-old man is hitting home runs ... He grins his boyish grin and bobs his head in the way he has and trots around the bases." In November 1987, *Time*'s cover story carried a different message. It read: "Who's in Charge? The Nation Calls For Leadership And There Is No One Home."

Yes, it is difficult to be a successful American President these days. Public opinion is notoriously fickle. The most serious foreign and domestic problems we face do not lend themselves to easy answers—yet we structure our political campaigns and news coverage in ways that require answers in 20-second sound bites. Unfortunately, 20 seconds is not enough for a plausible sounding rebuttal; the explanation of complex National Security Policy takes somewhat longer.

President Reagan, unlike his immediate predecessors, was a master at communication through the media. His fall from public favor came primarily from other causes—the Iran-contra affair and the twin budget and trade deficits that so weakened confidence in the economy.

We find ourselves in the uneasy situation where both executive and legislative leadership have eroded badly. In weakened condition, the leaderships at both ends of Pennsylvania Avenue need to help each other more than

ever; instead, we find unending bickering over the most crucial issues of the day—control over the budget, war powers, and nuclear armaments.

The battle lines over these issues have long since been drawn. The democratic leadership in the Congress questions the President's judgment and the quality of advice he receives. When this happens, Congress will inevitably assert its prerogatives. Presidents quite naturally have a different perspective. From their point of view, congressional encroachment is an infringement of their rightful authority, and once the Congress manages to capture a share of executive authority, it never relinquishes it voluntarily. As a result of these deeply held views, the Congress and the President have become bogged down in trench warfare over the budget, war-making powers, and treaty-making authority.

The basis for this struggle is found in the Constitution. Each branch of government is granted a role in our most basic affairs of state. While these roles are explicit, their applications aren't. The most basic and essential task of Presidential and congressional leadership is to balance constitutional prerogatives with the need for effective government.

If either branch asserts its prerogatives above all else, the system of checks and balances that our Founding Fathers so wisely devised breaks down. Our system of government can only work effectively when the President and congressional leaders respect each other's views and acknowledge their legitimate roles.

When the Congress asserts its prerogatives without due regard for Presidential authority, it can deprive the Chief Executive of the flexibility he needs to respond quickly in periods of crisis. The War Powers Resolution probably fits this characterization for some. Bear in mind, however, that the War Powers Resolution designates conditions for the emergency use of our armed forces by the President as long as Congress is notified, and congressional approval is subsequently obtained. Contrast this approach to the Ludlow amendment providing for a

national referendum before Congress could declare war, except in the most extreme circumstances. This proposed amendment to the Constitution was defeated in the House of Representatives only after vigorous opposition by President Franklin D. Roosevelt in 1938.

Other instances of unwise congressional encroachment on Presidential powers come quickly to mind. The Bricker amendment, for example, sought to place restrictions on the ability of the President to enter into Executive agreements. It failed by a single vote in 1954.

Just as the Congress has encroached on Presidential power from time to time, so too have Presidents unwisely taken an expansive view of their constitutional powers. Congressional abuses have been greatest during periods when the nation has flirted dangerously with isolationist sentiment; abuses within the executive branch have been greatest when our Presidents have been most isolated.

When Presidents wall themselves off from congressional advice and good counsel, they invite damage to themselves and to the national interest they are sworn to uphold. Presidents need the advice of other elected officials as well as the advice of their inner circle; they need alternative points of view, not a confirmation of their institutional or personal biases. The surest way for a President to foster narrowness and resentment on Capitol Hill is to exclude members of Congress from the process of making important decisions. I am concerned about true consultation, not notification after the fact.

Do our Presidents really want a blank check to conduct the nation's business? That's what President Reagan got in the Iran-contra affair—and he didn't want the Congress to know that he signed it. When the affair was disclosed in most, if not all, of its embarrassing particulars—as was inevitable—the President was deeply wounded. Much damage to the Presidency and to the national interest could have been avoided if Mr. Reagan had consulted with congressional leaders before deciding to ship arms to Iran or if he had promptly notified appropriate Members of his intelligence finding to do so, as required by law.

Congressional leaders naturally resent being asked to share in perilous "landings" when they have been systematically excluded from the "take-off" of policy decisions. Nowhere is this more true than in questions relating to war-making powers.

The Constitution specifically differentiates between the power to declare war and the power to make war. This crucial distinction was deliberately made at the Constitutional Convention. At one point during the convention, the draft Constitution conferred the power of making war to the Congress, but James Madison and Elbridge Gerry moved to change the word "Make" to "Declare," so as to leave the Executive with the clear power to repel sudden attacks. In theory, this division of power continues to this day: the power to declare war resides in the hands of the Congress; the power to conduct war resides in the hands of the President in his capacity as Commander in Chief of our armed forces.

In practice, something quite different has evolved over the past four decades. The last time that an American President asked the Congress to declare war was after the Japanese attack on Pearl Harbor. Our prolonged agony in Vietnam served, of course, as the impetus for the war powers legislation.

If you served in the Congress as I did during and after the Tonkin Gulf Resolution, you could understand why this legislation passed by such an overwhelming majority in both houses—enough to override President Nixon's veto. Without a declaration of war, this nation traveled inexorably down a slippery slope into the most draining and futile war in America's history.

The War Powers Resolution was not a reflexive piece of legislation, however. Members of Congress agonized over how Presidential and congressional prerogatives could best be shared in light of the conditions of modern day warfare. As floor manager of the bill, I did not wish to amend or alter the Constitution in any way; my colleagues and I were instead searching for new ways to fulfill the clear intent of the framers of the Constitution.

We recognized then, as we must now, that the initial decision to commit US troops abroad in the face of imminent hostilities is often the most critical decision of all. If that decision is ill-advised, it can rarely be reversed quickly. That's the nightmare about a bad policy decision: other bad decisions are almost sure to follow in due course. When this happens, and when American casualties begin to mount, it is extraordinarily difficult for either the President or the Congress to extricate our fighting men.

In such circumstances some people urge Congress to absent itself from the process, so that the President can execute policies that will work effectively and with a minimum of casualties—and at the same time that the President give military commanders in the field the leeway they need to end hostilities quickly.

These prescriptions amount to an abandonment of constitutional control over war-making. These notions presume that combat forces can solve the problem for which they were dispatched, and that when war begins, politics ends. But what if the decision to use force is not well-conceived to begin with? What if the problem is not amenable to a solution by US combat units in the field? How then can poor decisions be effectively executed? And how in the name of commonsense can military campaigns be waged in isolation from politics or political objectives? How, at the end of the day, does a great power withdraw combat forces committed as a result of mistaken decisions?

Many images remain infused in our collective consciousness as a result of the Vietnam experience, but none is more vivid than the picture of that helicopter atop the US Embassy building shortly before the fall of Saigon. And many years from now, Americans might react with collective grief at another picture yet to be taken.

The best way to avoid such national tragedies is to avoid that first momentous lapse in judgment. To his credit, Secretary of Defense Caspar Weinberger tried to

define conditions for avoiding the slippery slope of a future Vietnam. Mr. Weinberger proposed six tests to be applied when the United States considers the commitment of combat forces abroad:

—A vital national interest or a vital interest of our allies must be at stake.
—If we commit combat troops, we must commit to win.
—If combat forces are sent overseas, they must have clearly defined political and military objectives to fight for.
—The relationship between military objectives and the forces committed to achieve them must be continually reassessed and adjusted, as necessary.
—The US combat forces must have reasonable assurance of political support at home. In Mr. Weinberger's view, we cannot ask our combat troops "*not* to win, but just to be there."
—The Defense Secretary's sixth test for the commitment of US combat troops abroad was that they should be sent as a last resort.

As a member of President Carter's Cabinet, I know how easy it is to discuss overarching principles in the abstract and how difficult it is to implement them in the cold harsh light of international politics. We try as best we can to correlate policy guidelines with facts on the ground—or at least as many facts as we can determine as a crisis unfolds—and after enough smoke has cleared, we are left with the distance between our ideals and the new reality created by our actions.

I submit that the distance between the Reagan administration's policy guidelines and its commitment of US forces in the Gulf was particularly great. Surely, vital interests were at stake here, but few can argue that US military and political objectives had been clearly defined. Nor did anyone suggest that US forces should have been committed to "win" in the Gulf or that our forces had been sent as a last resort. Indeed, in some sense US ships

were dispatched just "to be there" as a deterrent. The episodes in the Gulf show just how difficult it is to establish clear criteria that fit the real cases—even when the criteria seem as reasonable as those Secretary Weinberger offered.

The President made the decisions to commit US combat forces into a situation involving imminent hostilities without adequate congressional consultation and without invoking his authority under the War Powers Resolution. Had he done so, congressional authorization would have been required within 60 days for US forces to remain in the field. A 30-day extension can be granted to ensure a safe withdrawal of US forces, and Congress wrote specific provisions to guarantee that it must reach an explicit decision within those 60 days. It is a canard to suggest that a President might be forced to reverse course by mere legislative inaction.

I can understand why Presidents are reluctant to follow the requirements of the War Powers Resolution. Our Chief Executives need flexibility in periods of great uncertainty. Our adversaries must not believe that they can injure American interests by playing off congressional majorities against the President.

Congressional majorities understand that flexibility is needed in crises and that our adversaries must not believe we will cut and run once we commit ourselves in a highly visible way. If anything, these factors have led Congress to support extended commitments in the past when it was unwise to do so—in Vietnam and Lebanon.

What, then, is the harm in following the requirements of the War Powers Resolution? This legislation wasn't passed to make war easier or harder—just to make it more considered. The 60-90-day deadline is admittedly a complicating factor. But the need for subsequent decisions will be there in any event once a commitment is made to send US combat troops abroad. And Presidents will be more likely to have congressional support for subsequent decisions if they thoroughly involve congressional leaders before the initial decision is made.

The War Powers Resolution is not responsible for our current debate and struggle over these tough issues. Instead, the War Powers Resolution makes us face up to the clear meaning of our Constitution and the requirement for communication and comity between the executive and legislative branches.

Compare the wrangling over war powers with the success story of cooperation—the congressional observer group for the nuclear and space talks in Geneva.

The initiative for the congressional observer group came from Senate leaders concerned that over 15 years had elapsed since a treaty negotiated by the United States was ratified. The idea, first formulated by Senator Byrd, was to create a small, select group of Senators—including the leadership and the relevant committee chairman and ranking minority Members—who would monitor the negotiations and provide advice and counsel to the administration. (Its members include Senators Stevens, Byrd, Dole, Nunn, Warner, Pell and Lugar—not Helms—as well as selected individual Senators, including Gore, Wallop and Moynihan.)

The congressional observers developed a group identity, much more so than individual Members of Congress who served as SALT observers in the past. In large part this was due to a collective effort by the observers to be briefed as a group and to travel as a group to Geneva at least once a negotiating round. When the Senate leaders cannot travel, they can designate other Senators to take their places, which helps colleagues to acknowledge the Senate observer group's unique role.

Many of the usual frictions over senatorial prerogatives have been set aside in this instance. The Senate observer group had four co-chairmen: Senators Pell, Stevens, Nunn, and Lugar. Staffing was drawn from the Leadership and from the Armed Services and Foreign Relations Committees. Observe group members were welcome at hearings dealing with negotiating issues even when they were not committee members.

Of course, the real test of the Senate observer group comes during the ratification hearings over an INF Treaty. Only then do we see if the Senate's increased role in the actual negotiations results in increased responsibility when it comes to considering amendments and reservations to the treaty, and when it comes to a final up or down vote. If the consultative process works successfully, observer group members can provide a counterweight to the inevitable centrifugal forces produced by a treaty ratification debate. Having been included in the negotiating "take-off" and well-advised of all the stops along the way, most of these Senators can be expected to support a safe "landing."

It appears that the Reagan administration sensed the value of the Senate observer group's activities. Briefings continued on a regular basis—by Soviet as well as U.S officials. In theory as well as practice, observer group members can play many useful roles. They provide outside advice to the President and his aides, reinforce important administration messages to the Soviets when necessary, and serve as a sounding board for unofficial Soviet proposals.

The role of the Senate observer group begins to suggest the possibilities of constructive partnership when an administration and the congressional leadership decide to work hand in hand.

Compare this approach to the impasse between the two branches over the reinterpretation of the Anti-Ballistic Missile Treaty—an impasse that need not have arisen if the President had consulted with congressional leaders during his administration's deliberations. Substantive consultations were lacking in this case, as in so many others. Consultations with all but one of our treaty negotiators were also dispensed with, as were private discussions with the Soviets to resolve any ambiguities over permissible testing.

The administration's reinterpretation stood logic on its head. How can a treaty of unlimited duration, intended to ban defense of the territory of each country,

apply only to ABM systems and components available during the period of negotiations? How can the Senate solemnly consent to ratify a treaty based on one administration's explanation of US obligations, only to have another administration assert that the treaty's central provisions meant no such thing? Is it any wonder that the Senate has not allowed its constitutional role to be subverted in this way? The impasse over the treaty's reinterpretation hurt the country but not as supporters of the reinterpretation suggest.

Strangely enough the Reagan administration's bargaining strength in the negotiations was not undermined. Indeed, dramatic progress coincided with vigorous congressional support for the traditional ABM treaty interpretation, continued compliance with SALT II limits, and several other arms control initiatives. Rather than retard progress, I believe the continued support for the ABM Treaty on Capitol Hill is what permitted the Kremlin to entertain deep cuts in nuclear forces. Without mutual understandings over defensive deployments a long-term process of nuclear arms reduction is most unlikely.

While the Reagan administration's treaty interpretation—as well as the Congress' resistance to it—did not hurt our negotiating position, it has hurt our standing around the world. Other nations expect us to live by our word and to faithfully carry out our solemn treaty obligations, not to play word games over mutually binding obligations that have been observed for a decade and a half.

As a result of this damaging situation, a majority of Senators—including many members of the Senate's arms control observer group—have taken effective blocking action. Elected officials who are not ideologues and who do not hold grudges can agree to cooperate on some issues while agreeing to disagree on others.

Our system of government clearly works best, however, when consultation is meaningful at the outset of a problem and when it continues as circumstances unfold. This is as true for treaty-making powers as for war-making powers. If Presidents exclude congressional leaders

from their rightful advisory role, they will promote narrow-mindedness instead of cooperation on Capitol Hill. If the Congress attempts to impose severe constraints on Presidential prerogatives, it will only stiffen the backbone of the occupant in the White House.

Our Founding Fathers issued both branches of government an invitation to struggle in the document they created. Our constitutional system of checks and balances does not condemn us to unending bickering and draining impasse, however. Great creativity and leadership have been produced during our nation's history—without sacrifice of the freedoms we hold dear.

The Constitution allows men and women in public office to use their considerable talents for the public good but only when the executive and legislative branches accept the common burden of working together. This is especially true in the area of national security policy. Without sharing responsibility and restraint between the two branches of government, our nation walks in shadows. With it, we can light the way for others—even our adversaries.

PART I

DIVIDING CONSTITUTIONAL POWERS

WHITE HOUSE DECISIONMAKING

By PAUL ANDERSON
Lawrence University

I make foreign policy.
—Harry Truman

WHO CONTROLS THE FOREIGN POLICY OF THE UNITED States? Does the Constitution grant the President broad Executive control over the foreign policy of the United States? The Iran-contra hearings provide one answer. Lieutenant Colonel Oliver North took the position that "the President ought to be able to carry out his foreign policy" without interference from the Congress. As did Admiral John Poindexter, who wrote this memorandum:

> [I]n a meeting I had with the President, he started the conversation with "I am really serious. If we can't move the Contra package [in the Congress] before June 9, I want to figure out a way to take action unilaterally to provide assistance." ... [T]he President is ready to confront the Congress on the Constitutional question of who controls foreign policy.

Both of these comments were prompted by congressional restrictions on executive branch activities in support of the Nicaraguan opposition forces. Is the President within his constitutional prerogatives in attempting to act against the wishes of Congress? Or, is Congress micromanaging foreign policy?

Congress, however, is not the only institution charged with micromanagement. Executive branch

departments routinely complain about interference by the White House in the details of their day-to-day operations. Is the White House within its constitutional prerogatives in challenging the professional autonomy of the executive branch departments and agencies?

Both issues point to a question of the limits of legitimate decisionmaking power in the White House and reflect the institutional character of the analysis in which available resources, individual incentives, and institutional constraints shape the struggle for power in foreign affairs.[1] The perceived legitimacy of the actions of the participants is, on this view, jointly determined by the electoral and institutional models. Elected officials—particularly Presidents—have an interest in justifying action in terms of the electoral model of legitimacy. They are, after all, the only political actors who can claim elections as a direct source of legitimacy. Members of the permanent government have an obvious interest in institutional sources of legitimacy, but so do Members of Congress. While the "House may not be a home," neither Senators nor Representatives face a President's certainty of a limited term in office. Thus, Congress has a clear interest in deriving legitimacy from the institutional model. In the end, the goal of the analysis is to understand the institutional and political dynamics of the competition for power in foreign affairs in a way which avoids simple analogies to pendulums: Understanding why legislatures react to a growth in the foreign affairs powers of the executive branch is not advanced much by noting that actions inevitably produce reactions. Institutions (and players in institutions) react to other institutions and players in ways which reflect individual interests, available resources, and environmental constraints. Reactions are not blind, and they are not haphazard. They occur along predictable institutional lines.

A Presidential Monopoly?

The issue of a Presidential monopoly requires an analysis of the competing claims of Congress and the

departments and agencies of the executive branch. A President's claim to a monopoly (or even the predominance) of power in foreign policy does not rest on any clear constitutional grant. To be sure, the President has considerable powers: Commander in Chief of the armed forces, negotiator of treaties, and nominator of ambassadors. These explicit grants, in conjunction with the Executive power of the Presidency, allow Presidents to exercise discretion in recognizing foreign governments, committing the nation with executive agreements, and requesting the resignation of appointed officials. Congress, however, has an equal claim to substantial foreign affairs powers. The Constitution gives to Congress the power to declare war, to raise an army, to raise and appropriate money, and to advise and consent on treaties and appointments.

Some have argued for a broad grant of power through the Executive. But a case can be made that as in domestic affairs, the President executes the laws, Congress makes them. On this view, while the President is responsible for implementing foreign policy, it is made jointly with the Congress, just like any other law.

But constitutional issues aside, a comparative analysis of the institutional powers and advantages of the Presidency and the legislative branch suggest that whatever the role of the Congress in developing foreign policy, the President has far more practical power over foreign policy than Congress. Institutional advantages include the ability to set the foreign policy agenda and access to information through embassies and the intelligence agencies.

What is the weight of the argument against the constitutional powers granted to Congress? There are four practical implications for the division of powers and responsibilities between the two branches: (1) The President is the voice of the nation in foreign affairs. To the extent foreign policy consists of words, Presidents do make foreign policy. A President's responsibility for articulating foreign policy does not imply that Congress is

prohibited from doing so, but the resources, interests, and institutional constraints on the legislative branch simply make it less able to perform the function. (2) Congress can effect a veto of Presidential foreign policy—especially when funding is central to that policy. (3) Congress is not eager to force a President to take positive action. The characteristics of the institution also make it difficult for Congress to formulate a coherent alternative to Presidential foreign policy. (4) Congress is not in a position to provide effective leadership in foreign policy. Day-to-day planning, supervision, and oversight are outside the capabilities of Congress. The institutional resources and structures all work to the advantage of the President.

Thus, while the institutional advantages distributed by the Constitution provide the Presidency with practical domination of foreign policy, they do not support a Presidential monopoly. The President may articulate the nation's foreign policy, and the President may implement the nation's foreign policy, but it is the President and the Congress that make a *sustainable* foreign policy.*

The conclusion is that foreign policy is not the sole prerogative of the Presidency. Presidents clearly have decided advantages—both constitutionally, institutionally, and politically—but not a monopoly. The power is clearly shared with Congress.

At first glance it seems obvious—the President is vested with Executive powers. But the executive branch departments are joint creations of the executive and legislative branches and established by statute. Executive privilege is not an absolute protection afforded to all within the executive branch. Congress can call executive branch officials to account in both oversight and budget hearings. In terms of the realities of day-to-day government,

*The last twelve years or so of executive-legislative conflict over foreign policy have tended to be played out in terms of short-term tactics—let's win the next vote—in contrast to the theme that a coherent foreign policy must be the product of both branches.

the Presidency and the legislative branch are competing to control the permanent government.

While there is no denying the President's executive powers, the executive branch departments and agencies have a source legitimacy independent of the Presidency. The struggles between the White House and the executive departments are not simply a subordinate refusing the legitimate orders of a superior. All take an oath to "preserve, protect, and defend the Constitution of the United States," although most would not go as far as Douglas MacArthur:

> I find in existence a new and heretofore unknown and dangerous concept that the members of our armed forces owe primarily allegiance to those who temporarily exercise the authority of the executive branch, rather than to the country and its Constitution which they are sworn to defend.[2]

We elect foreign policy novices (generally speaking) to be President. Rarely does a President have a claim to *independent* expertise in foreign affairs. Knowledge and expertise are an important source of legitimacy in this society—and bureaucratic expertise exists independently of the President.

From both the standpoint of the *executive branch departments* and the *legislative branch*, the President is not the sole legitimate actor in foreign affairs. All three have legitimate roles in the formulation of US foreign policy.

The Institutional Dynamics of Competition

In the absence of a Presidential monopoly, the institutional dynamics of the competition for power and influence between the White House, the Congress, and the executive branch departments take on a special significance. If there are no provisions defining wise action and no clear definitions of appropriate influence, then the resolution of the question of the legitimacy of White House decisionmaking in foreign affairs will depend upon the relative powers and positions of the *three* contending parties.

This analysis will proceed along two lines of pique: (1) the charges by the executive departments that the President and Congress each inject themselves where they do not belong; and (2) the charges by the President and the executive departments that Congress injects where it is not invited.

While scientific management is not today's administrative orthodoxy, its influence persists in the concept of "neutral competence." Neutral competence, according to Heclo, "consists of giving one's cooperation and best independent judgment of the issues to partisan bosses—and of being sufficiently *uncommitted* to be able to do so for a succession of partisan leaders."[3]

Unfortunately, it does not work. The problem with *neutral competence* is not that it is impossible to imagine a government established according to its precepts. The problem is maintaining it once it has been established. A stable system of neutral competence requires a permanent government that will provide alternatives, information, and advice and that will accept advice, weigh the competing political stakes, make the policy decision, and return the issue to the permanent government department for implementation. These requirements are inevitably undermined by parochialism and conflict.

Organizational parochialism is a neutral consequence of specialization and division of labor. Organizing is predicated on the division of large problems into subproblems and large goals into subgoals. The creation of separate and permanent subunits to deal with a particular set of subgoals and subproblems creates a situation in which individuals attend more to the goals of their subunit than they do to the goals of the organization. The focus of attention in a permanent and professional work force creates a system in which individuals develop an identification with their organizational subunits. As a result, the consequences of alternatives are perceived in terms of the goals of the organizational subunit rather than the larger goals of the organization. What a President receives from the permanent bureaucracy is not

innocent information and advice but strategically presented information biased by the source. Thus, continuity and expertise, two critical elements of neutral competence, produce, instead, an inevitable parochial interest.

Viewed from the other side, an established *neutral competence* is undermined by the inevitable changes produced by the American political system. While a professional civil service can ensure stability among bureaucratic actors, the political leadership operates under a very different set of circumstances. Elections change leaders—and leaders have interests which are not necessarily shared by the larger organization of the government. The result is that elected leaders and political appointees start from the presumption that their policy goals and political interests are not necessarily shared by the permanent bureaucracy (Newsom, 1986).

This analysis of the internal contradiction of *neutral competence* would suggest that it has only appeared to work because of limited variation in the goals and interests of elected officials. The ideal of neutral competence in foreign policy began to unravel in the Kennedy administration and coincided with the growth in the power and influence of the White House and National Security Council (NSC). The result is that now we presume attempts by the Presidency to politicize the permanent bureaucracy. We are where we are today because the natural processes of institutions have led us there—and not because we failed to understand the moral righteousness of neutral competence.

Analyses of competition between the branches frequently adopt a pendulum analogy in which congressional assertiveness is seen as an inevitable and natural reaction to a growth in Presidential power. If Presidential control of the bureaucracy is best understood as a natural consequence of processes, then congressional attempts to control the executive branch departments and the Presidency are best understood in similar terms.

Modern congressional attempts to constrain Presidential policy-making in foreign affairs did not begin

with the 1973 War Powers Resolution. The NSC began life as an attempt by an energetic Congress (and a disgruntled bureaucracy) to impose constraints on an unwilling President. The NSC was an attempt to constrain Presidential decisionmaking in foreign policy, and grew out of dissatisfaction with the decisionmaking style of Franklin Roosevelt. Centered in the White House, bypassing the established executive departments, F.D.R. attempted to prevent a frequently hostile bureaucracy from undermining his policies. Truman's concern that the NSC represented a threat to his authority as President led him to avoid NSC meetings until after the start of the Korean War.

Conflict between the Presidency and Congress is routine. They are, after all, both competing for control of the executive branch departments and agencies. But the recent vigorous attempts by Congress to constrain Presidential choices and to direct bureaucratic implementation reflect an institutional response by Congress in the face of increased politicization of the executive departments by the President. Politicization means threatening existing institutional presumptions, agreements, and arrangements. Members of Congress have an interest in the existing policy and institutional arrangements which have been shaped by decades of interaction and legislative action. Simply put, they want to preserve their influence. By pressing a more *political attitude* on the bureaucracy, Presidents stimulate a reaction by the Congress. To ask Congress to refrain from attempting to constrain Presidential actions is to ask them to give up influence in the face of an increasingly political Presidency.

Much as in the case of neutral competence, the relative peace between Congress on one hand, and the Presidency and the executive departments on the other—the period of bipartisan foreign policy—did not reflect a stable commonality of views as much as an accident of history in that bipartisanship in foreign policy was no more sustainable than neutral competence.

The period of peace and stability—and it wasn't all that peaceful or all that stable—rested on a zone of discretion. That is, Congress allowed the Presidency and the executive departments considerable discretion in implementing foreign policy. Such a large zone of discretion is possible only when there is fundamental agreement on the fact and value premises which will give future decisions.[1] The period of bipartisanship was a time when Members of Congress could grant discretion because the outcome was not likely to be too far from what would have happened had Congress played an active role in the process. Legitimacy was conferred by the continuity of interaction between Congress, the executive agencies, and the Presidency. But, as Presidents claimed strong mandates from the electorate, as Presidents campaigned against the Washington political establishment, as Presidents adopted the electoral model of legitimacy, the structure of policy and interaction was undermined.

Fundamentally, micromanagement is now a fact of constitutional and political life. There is little likelihood that Presidents will defer to the expertise in the executive departments, little likelihood that Congress will allow Presidents a free hand in foreign policy, and little likelihood that Congress will not attempt to control the executive departments.

We could be approaching a "tragedy of the commons" dilemma in which the moves to micromanage prompt a self-destructive spiral of escalating intrusions. Fundamentally, however, it is good the boundaries of legitimate action are not drawn with sharp precision—for it is only when one group is certain of their powers and the other groups do not challenge them that excesses are inevitable. Compared to the alternative, it seems better to keep arguing.

Notes

1. J. G. March and J. P. Olsen, "The New Institutionalism: Organizational Factors in Political Life," *American Political Science Review* 78: (1984) 734-49.

2. R. K. Betts, *Soldiers, Statesmen, and Cold War Crises*, (Cambridge, Mass.: Harvard University Press, 1977), p. 50.

3. H. Heclo, "OMB and the Presidency—The Problem of 'Neutral Competence,'" *Public Interest* 38: (1975) 81.

4. H. A. Simon, *Administrative Behavior* (New York: Free Press, 1976).

THE INTELLECTUAL LEGACY OF OUR CONSTITUTION

By GREGORY D. FOSTER
National Defense University

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the most wisdom to discern, and the most virtue to pursue, the common good of the society.

—James Madison

ANY ATTEMPT TO ADJUDGE THE RELEVANCE OF THE IDEAS of the Founding Fathers to the realm of strategymaking, strategic thinking, and national security cannot help but begin with a statement on the intellectual prowess of our forebears.

Individually and collectively, the Founding Fathers were legitimate intellectual heavyweights. Henry Steele Commager, in his excellent study, *The Empire of Reason*, accorded the founders the appellation of philosophes (to both compare and distinguish them from the eighteenth century French intellectual counterparts). Whereas the philosopher was a scholar, a savant, one who devoted himself single-mindedly to the search for truth that was both universal and permanent, the philosophe was interested chiefly in those truths that might be useful here and now. Whereas the philosopher was preoccupied with the mind and the soul of the individual, the philosophe was more concerned with society than with the individual, and with institutions rather than with ideas. Whereas the philosopher constructed systems, the philosophe formulated programs. What distinguished the philosophes

everywhere was a commitment to the immediate and the practical—government, law, the penal code, censorship, slavery, religious bigotry.

These were men of both ideas and action. Little wonder that Jefferson characterized the Constitutional Convention as "an assembly of demigods," or that Madison noted, "There never was an assembly of men, charged with a great and arduous trust, who were more pure in their motives, or more exclusively or anxiously devoted to the object committed to them."

The Founding Fathers had a fully integrated world view that embodied science, philosophy, history, law, religion, and politics. They were students of all these disciplines and believed, with Montesquieu, that the fundamental principle of republican government was virtue. Though believing generally in the classical notion of virtue, they stopped short of making it a foundation stone of the Constitution. Their ideal, nonetheless, was a pluralistic society, governed more by qualities of citizen character than by public rules.

Finally, the Founding Fathers were steeped in the lessons of history but with a definite eye to the future. Tocqueville's observations led him to conclude of America,

> Democratic nations care but little for what has been, but they are haunted by visions of what will be; in this discretion their unbounded imagination grows and dilates beyond all measures.... Democracy, which shuts the past against the poet, opens the future before him.

Legalism and Bureaucracy

The Founding Fathers subscribed to the notion that government should be constituted on the basis of laws rather than of men—an objective standard of right behavior designed to curb the innate passions of man and to protect the citizenry from tyranny and despotism. They believed, with Aristotle,

> He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an

> element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.

The Constitution, then, as the "supreme law of the land," was to be the final word in all matters of governance. Over time, as historian Edmund Morgan has noted, it has taken on the character of holy writ, embodying all-but-eternal verities. But if the Founding Fathers are the prophets and apostles of popular sovereignty, he notes, then the members of the Supreme Court are its high priests.

John Marshall's famous opinion in *Marbury v. Madison* firmly established the principles of judicial review: "It is, emphatically, the province and duty of the Judicial Department to say what the law is." More than a century later, Charles Evans Hughes would assert that the Constitution is what judges say it is, and the judiciary is the safeguard of our liberty and property.

Thus, jurists became the "secular hermeneuts" of our society, uniquely qualified to interpret the "truth" as prescribed by law. This assumed added significance in that, over time, we became an increasingly litigious society, totally enamored with the law as the solution to all problems. Today, we suffer from a national disease that Bayless Manning has termed "hyperlexis"—the pathological condition caused by an overactive law-making gland.

The ramifications of this are two-fold. First, legalism has come to dominate our approach to problem solving and has even affected how we think. The law, in its emphasis on cases is particularistic or atomistic, and in its emphasis on precedent is backward looking and static in orientation, two attributes that are not particularly conducive to strategic thinking. Second, on our overreliance on jurists as secular hermeneuts, we have abrogated our civic responsibilities and our intellectual responsibilities. Our ability to engage in critical reasoning, accordingly, has atrophied while our desire to do so has virtually disappeared.

The problem with all this is as described by Jethro Lieberman in his book *The Enduring Constitution:*

> The danger is not merely that the judges will thwart majority will. A far more insidious peril is that we will forget as a people the calling of politics and the necessity of political action. Judicial review may sap the moral sense that we the people are responsible for the conduct of public affairs and that what we and our representatives do matters.

Infatuation with the law also produced and nurtured a phenomenon that drives the wheels of government today but that was hardly foreseen in its totality by the Founding Fathers: *bureaucracy*. German sociologist and political economist Max Weber, the "father of bureaucracy," told us that bureaucracy in its ideal type embodies a legalistic purity, where officials are subject to strict systematic control and discipline and enforce the law "without hatred or passion and hence without affection or enthusiasm." Bureaucracy emerged out of the need for more predictability, order, and precision in the management of private and public enterprises. Its hallmarks are efficiency, specialization, routinization, hierarchy, and strict rules or procedures. Though characterized by some as institutionalized rationality, *it is not;* it is institutionalized proceduralism—a breeding ground for crisis management and, thus, the antithesis of strategic thinking.

Moralism and Ideology

Reverence for the law contributed no less to the moralistic side of the Founding Fathers than to their purely legalistic side, for as society was to be governed by civil laws, man in his pristine state already was governed by the laws of nature. In the words of Rousseau,

> In vain do we seek freedom under the power of the laws. The laws! Where is there any law? Where is there any respect for law? Under the name of law you have everywhere seen the rule of self-interest and human passion. But the eternal laws of nature and of order exist. For the

> wise man they take the place of positive law; they are written in the depths of his heart by conscience and reasons; let him obey these laws and be free; for there is no slave but the evil-doer, for he always does evil against his will. Liberty is not to be found in any form of government, she is in the heart of the free man, he bears her with him everywhere.

Though we now have come to be regarded more as a secular nation, the moralistic tone of Rousseau and the Constitution—embodied most notably in the espousal of liberty, equality, and justice—derived from strong religious roots. John Diggins observes that the role of religion in the Founding Fathers' thought is as complex as it is ironic. The irony lies in the curious fact that those who remained under the influence of Calvinism and Hume—Adams, Hamilton, and Madison—doubted the vital importance of religion in preserving the Republic, whereas those who remained free from a concern for sin—Washington and Jefferson—often looked to religion as one of the foundations of political morality. Washington maintained,

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.... let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principles.

The relationship between reason and the passions that derive from morality was central to the thinking of the Founding Fathers. Hume's view on the subject is probably most telling:

> Since morals ... have an influence on the actions and affections it follows, that they cannot be deriv'd from reasons; and that because reason alone, as we have already prov'd can never have any such influence. Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular. The rules of morality, therefore, are not conclusions of our reasons.

It is that keen moralistic fervor that also feeds *ideology*—a fact that, as with legalism and bureaucracy, came most clearly into focus in the crusading temperament of Woodrow Wilson. Whatever form ideology may take--be it Marxism-Leninism, anticommunism, free enterprises, or simply dissent (the ideology that drove the Founding Fathers)—it is a phenomenon that completely undermines reason and rational thought. As Marx himself noted, "Ideology is the illusion of an epoch."

Ideology draws formal discourse into what Clifford Gaertz termed "maps of problematic social reality," those shifting patterns of values, attitudes, hopes, fears, and opinions through which people perceive the world and by which they are led to impose themselves upon the world. Ideology is a powerful belief system that distorts reality, blinds its adherents to facts, and negates the critical faculties altogether. As such, it, too, like the crisis mentality that bureaucracy engenders, is antithetical to strategic thinking.

Consent versus Consensus

That seminal phrase of Jefferson's in the Declaration of Independence— "governments are instituted among men, deriving their just powers from the consent of the governed"—was a central, though implicit, premise of the Constitution. The idea came down to Jefferson from John Locke, who averred,

> Since a rational creature cannot be supposed, when free, to put himself into subjection to another for his own harm ... prerogative can be nothing but the people's permitting their rulers to do several things of their own free choice where the law was silent, and sometimes, too against the direct letter of the law, for the public good and their acquiescing in it when done.

This basic principle of consent was that the few would govern the many (the implicit premises being that the few were qualified to do so, and that the many were distinctly unqualified). According to Rousseau,

> If we take the term in the strict sense, there never has been a real democracy, and there never will be. It is against the natural order for the many to govern and the few to be governed.

Republican government was founded on this bifurcation of the policy. As Madison noted in *Federalist*, No. 10,

> The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater the number of citizens, and the greater sphere of country, over which the latter may be extended. The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.

In effect, what the republican form of government and the idea of consent did was to legitimize political inequality. Montesquieu, in his *Spirit of Laws*, noted that, "In the state of nature ... all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the laws." Interestingly, Montesquieu made a comparison that Tocqueville also would make later—that concerning the equality that obtains in republican and despotic regimes; in the former, men are equal because they are everything, in the latter because they are nothing. But Montesquieu goes on to observe that the principle of democracy is corrupted every bit as much when there is too much of it as when there is none of it. Why? Because the people want to manage everything for themselves, to debate for the senate, to execute for the magistrate, and to decide for the judges. The great advantage of representatives is their capacity for discussing public affairs, an activity for which the people collectively are extremely unfit.

Thus, the popularity of republican government and the consent principle among the Founders was due to a generally low opinion of human nature. History had

taught our forebears that men were basically creatures of ambition, passion, pride, envy, intemperance, greed, and inconsistency—hardly perfectible enough to conduct themselves collectively with prudence, dignity, honor, virtue, and magnanimity.

Hamilton was most acerbic in his view of mankind—man being, in his mind, "ambitious, vindictive, and rapacious." Why has government been instituted at all? he asked. "Because the passions of men will not conform to the dictates of reason and justice, without constraint." Madison, too, shared this view: "But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary."

Jefferson was relatively alone in adhering to his belief in the sanctity of the people. In his *Notes on Virginia*, he opined,

> In every government on earth is some trace of human weakness, some germ of corruption and degeneracy, which cunning will discover, and wickedness insensibly open, cultivate and improve. Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree.

Jefferson assumed that if the people are to be equipped to perform their civic duty, government must undertake to educate them:

> I know of no safe depository of the ultimate power of the society but the people themselves, and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion.

Historian Edmund Morgan observes that the Constitution has become the will of the people only by virtue of an unspoken agreement to accept it as such, an agreement expressed in a continuing *tacit* (and frequently uninformed) acquiescence rather than in any explicit declaration at a particular time and in a particular place. Herein lies the crucial qualitative difference between

consent and consensus. Consent feeds on tacit acquiescence—an intellectually benumbing enterprise. Consensus, in contrast, is the fundamental concomitant of strategy and requires active involvement.

There are more than a few among us who would make the fatuous claim that exercising the right to vote is the citizen's means of political involvement, of "having a say" in public policy. As Hendrick Hertzberg notes, however, voting in the United States is purely a civic sacrament—a ritual of faith, not an exercise of political power. When we vote for a candidate to represent us in Congress, we cannot be sure of having an opportunity to vote for someone to represent our point of view. Moreover, merely voting someone into office gives us relatively little control over the policies he or she pursues or supports.

War and Peace

It is easy to see how our forebears may have been influenced by two different conceptions of war—the more or less traditional conception, as articulated by Rousseau, to which we continue to subscribe today and the relatively more robust, though also more cynical, conception of Hobbes.

Rousseau said, "War ... is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as man, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. Finally, each State can have for enemies only other States, and not men."

Judging from the manner in which matters of war were treated in the *Federalist* papers, principally under the pen of Hamilton, the prevailing conception was that of the use of military force between *states*. In numerous instances, Hamilton spoke of man's bellicosity and thus the inevitability of war; in *Federalist*, No. 6, for example.

> To look for a continuation of harmony between a number of independent, unconnected sovereignties in the same

> neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.

Providing for the common defense therefore invited *military* preparedness (*Federalist*, No. 23):

> The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the goverment of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.

The danger, of course, lay in the threat to liberty implicit in standing armies (*Federalist*, No. 8):

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have the tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

Secrecy: The Ultimate Intoxicant

Finally, there is value in looking at how the Founding Fathers viewed secrecy, for, though espousing a society in which openness would provide an antidote to tyranny, they set a precedent for quite different practices. In fact, prior to becoming Chief Justice, John Marshall, speaking in 1800 before the House of Representatives, captured the tenor of the times then, no less than now:

> The nature of transactions with foreign nations ... requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

Earlier, following the War of Independence, George Washington had observed,

> The necessity for procuring good intelligence is apparent and need not be further urged—all that remains for me to add is that you keep the whole matter as secret as possible. For upon secrecy, success depends in most enterprises of the kind and for want of it they are generally defeated however well planned.

Washington also was instrumental in gaining agreement to keep the deliberations of the Constitutional Convention entirely secret. "Gentlemen agreed" not to speak or write of what was going on until it was over. Otherwise, it was believed, candor would have been impossible, and the threat of deadlock due to public support of dissidents heightened. Jefferson, away on ministerial duties in France, was furious when he learned of the rule. He argued by mail that the debates should be open.

There is great irony, and perhaps a touch of hypocrisy, in Jefferson's position. When he entered the Presidency, he pledged to return the government to the original principles of the Constitution. His administration, however, reflected an episodic pattern of behavior to circumvent constitutional structures that did not suit him. In 1801, for example, he issued secret orders to a naval squadron to "chastise" the Barbary pirates in the Mediterranean for looting American merchant ships; he did not notify Congress for more than six months—and then in his first annual message. Two years later, he purchased Louisiana for $15 million from Napoleon before Congress had appropriated funds for the purpose.

Thus, there is quite a sterling heritage for the secrecy that has become such a commonplace feature of the national security state today. Garry Wills notes,

> The wartime justification of secrecy used to run this way: The citizens must be kept in the dark, as a necessary evil, in order to keep the enemy from knowing what one's country is doing and taking action on the basis of that knowledge. The modern presidency takes the means and makes it the end: The citizens are kept in the dark about what the enemy already knows, lest the citizens take action to stop their own government from doing things they disapprove of.

The National Security State Today

For 40 years now, since the passage of the National Security Act of 1947, the United States has been a national security state. Over a period of four decades, virtually our every thought, word, and deed have been guided by an overweening concern—some would say an obsession—with national security and secrecy. The implications of this state of affairs are more than a little difficult to grasp because even the act that bore its name did not venture to define *national security*. As a consequence, the term has become all things to all people, yet nothing of essence to anyone—more an *ex post facto* rationalization for behaviors bureaucratic, political, and ideological in origin than a meaningful guide to effective action on the world stage.

The National Security Act itself focused on structural changes—the creation of a National Military Establishment, a National Security Council, and a Central Intelligence Agency—in seeking "to provide a comprehensive program for the future security of the United States" and "to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security." Although the institutional framework for the national security state was put in place in 1947, the underlying ethos that would perpetuate its existence was not *then* clearly enunciated. The basic tenets would be codified formally only three years later with the submission by the Secretaries of State and Defense of NSC-68 to the National Security Council.

NSC-68 juxtaposed the determination of the United States to (a) maintain the essential elements of individual freedom as set forth in the Constitution and Bill of Rights, (b) create conditions under which our free and democratic system can live and prosper, and (c) fight if necessary to defend our way of life, against what was adjudged to be the fundamental design of those in control of the Soviet Union and the international Communist movement: "the complete subversion or forcible

destruction of the machinery of government and structure of society in the countries of the non-Soviet world and their replacement by an apparatus and structure subservient to and controlled from the Kremlin." In characterizing America as the principal center of power in the non-Soviet world, as the bulwark of opposition to Soviet expansion, and as the principal enemy whose integrity and vitality must be subverted or destroyed by one means or another if the Kremlin is to achieve its fundamental design, NSC-68 specified three overarching objectives for the United States: (1) To make ourselves strong, both in the way in which we affirm our values in the conduct of our national life, and in the development of our military and economic strength. (2) To lead in building a successfully functioning political and economic system in the free world. It is only by practical affirmation, abroad as well as at home, of our essential values that we can preserve our own integrity, in which lies the real frustration of the Kremlin design. (3) To foster a fundamental change in the nature of the Soviet system, a change toward which the frustration of the design is the first and perhaps the most important step.

NSC-68, though classified and hidden from public view until it was declassified by Presidential national security adviser Henry Kissinger in 1975, cast in concrete what has been the unifying theme for the conduct of international affairs by every US administration from Truman to Reagan: the containment of communism. It provided the raison d'etre for the institutional framework of the national security state established by the National Security Act. If NSC-68 defined the ends toward which America's postwar efforts were to be directed, then certainly the National Security Act prescribed the institutional means to be employed for attaining such ends. The irony that the provision of the means preceded the specification of the ends perhaps would have been lost to posterity had it not been for the perversion of means and ends represented by the Iran-contra scandal that

occupied much of America's attention throughout the first half of 1987.

Whether by divine providence or simply a cosmic roll of the dice, the irruption of the Iran-contra fiasco in 1987 was fortuitous: a crisis framed by the 40th anniversary of the National Security Act and the 200th anniversary of the US Constitution. Anyone who witnessed even a small portion of the constitutional hearings on this sordid affair received both an unexpectedly valuable lesson in civics and a glimpse at the mentality that spawned and has been further nurtured by the national security state. The year 1987 therefore has special meaning, for it prompts us to step back from the fray and take stock of where we have been as a nation, where we are, and where we are going.

The Constitution is a way of life, a congeries of values that sets the entire moral and legal tone for what America was meant to be by its founders. Whether we realize it or not, the Constitution suffuses the very warp and woof of American life. As Henry Clay remarked in a January 1850 speech before the Senate, "The Constitution of the United States was made not merely for the generation that then existed, but for posterity—unlimited, undefined, endless, perpetual posterity." If this is so, if the Constitution was intended to be—or, through time, has simply become—a living document, we must ask ourselves how well it wears in the tenor of modern times. More precisely, we must ask what relationship there is and should be between constitutionality and national security, for as the former embodies the values we cherish and the political apparatus by which we live, the latter reflects the peculiarly demanding nature of the contemporary international environment.

The fact that we are a national security state not only reflects the times in which we live but also gives a whole new cast to our view of the Constitution. Due to the wonders of technology, the world today is both smaller and considerably more complex than it was in colonial times. Things that could have been, and were, ignored by our forebears, due to lags in distance and time, no longer can

be. If ever we could have considered ourselves a nation apart, we no longer have that self-deluding luxury. We are part of an interactive (though certainly not a fully integrated) global network. Resource interdependency has become a vital ingredient of modern life, making international commerce the handmaiden perhaps less of comity than of conflict.

American interests have proliferated—due partly to self-imposition, partly to kindred loyalties, partly to exigent responsibilities. The threats of our way of life, perceived and actual, have come to be viewed as more persistent, more numerous, and certainly more proximate than anything known to the Founding Fathers. Open-ended arms competition, undeclared war (by deterrence and by armed intervention), covert operations, propaganda, and intelligence have become the hallmarks of the national security state, and secrecy, deception, and censorship some of the more contentious and visible by-products. We are left to ask, are constitutionality and national security fundamentally compatible or incompatible? If they are incompatible, which should govern?

This latter question, though in the minds of purists hardly worthy of being posed, is nonetheless one rich in latent assumptions and premises that we ignore at great peril. It, in fact, was this very question—unarticulated, largely undiscernible—that lay at the root of the means-ends perversion characterized by the Iran-contra affair. There, xenophobic minions, convinced of the purity and rectitude of their mission (to stem the flow of communism), frustrated by the inefficiency of our government, and contemptuous of the capacity of the American people to grasp the nuances of international affairs, flagrantly lied to the Congress, deceived or excluded from consultation key Cabinet members, and ultimately acted on matters of clear Presidential import, allegedly without the knowledge of the President himself.

Thus, the ends sought and the means employed, however useful in national security terms they may have been deemed by their sponsors, were of questionable

constitutional propriety—so much so that the ultimate constitutional ramifications of the affair clearly outdistance those surrounding Watergate. It is essential that an assiduous effort be made to clarify and place in proper perspective the link between *constitutionality* and *national security*.

To examine this relationship is to go well beyond the rudimentary level of discourse that typically attends the subject. Rather than focusing simply on such structural matters as war powers, freedom of the press, the congressional role in treaty ratification and defense spending, or Presidential prerogative writ large, it is necessary to address the more fundamental question of whether the ideas and ideals explicitly or implicitly embodied in the Constitution provide the intellectual wherewithal for coping successfully with the contemporary international environment. In other words, does the Constitution, as the supreme law of the land and a stentorian statement or moral philosophy, provide a basis for strategic thinking no less than for legal and moral thinking?

In the final analysis, the Iran-contra affair, whatever its legal and moral ramifications, represented an acute failure of strategic vision—ingrained myopia, bred by ethnocentric, ideological fervor, totally insensitive to the risks or likelihood of *unintended consequences*. Judged in the context of other strategic failures by this country, we might consider whether the 1987 stock market crash was a purely economic aberration or but one in a series of global incidents reflecting the diminished credibility and stature of the United States.

Strategic Thinking and the Constitution

Given the centrality of the Constitution to American life, even if only as a subliminal touchstone to behavior, there is more than academic value in attempting to discern whether the cardinal precepts and intellectual origins of that document might not provide a sound basis for improved strategic thinking. Americans are a demonstrably anti-intellectual people, a point convincingly

argued by Richard Hofstadter over two decades ago in his Pulitzer prize-winning book, *Anti-Intellectualism in American Life.* No less do we abjure strategic thinking, an affliction attributable as much as anything to our underdeveloped sense of what strategy is and how it operates.

Strategy is not, as neo-Clausewitzians would have us believe, merely an instrumentality of policy, the means of carrying out the dictates of policy direction metaphysically derived. Nor is it the sole purview of practitioners of the military art. Rather, strategy is a comprehensive system of ideas for coping with the governing environment—a world-view that enables one to understand (not merely to know) and to act on (not merely react to) the forces emanating from that environment. It embodies both ends and means and provides a normative architecture within which the more focused policies of the state are formulated. The result, ideally, is a degree of conceptual structure and policy consistency that obviates the need for constant revisitation of first principles each time a new situation arises.

Strategy may be characterized as a *philosophy of global conduct*, for its foundation rests on the enunciation of guiding premises about international behavior that are truly philosophical in scope and content. These premises range from the relatively esoteric (Are there objective facts in the international environment, or are such facts perceptual constructs that can be orchestrated and manipulated?), to the more instrumental (What is the nature of conflict? What is the utility of force?), to the applied level of real-world relationships (Is the US-Soviet relationship zero-sum in nature?).

Power is the quintessence of strategy—mostly an exercise of the intellect rather than of the musculature. It seeks, through force of mind rather than through the employment of military force, to exact desired behaviors from an adversary. While the selective use of military force may, on occasion, be deemed necessary, such use should be viewed as merely a physical means to a psychological end. Properly conceived, strategy in the modern

era is not military strategy but grand strategy—the coordinated use of all the resources, military and nonmilitary, of a nation or alliance to achieve prescribed objectives.

Strategy and consensus are fundamental concomitants, each depending for its actualization on the other. In other words, as strategy is dependent for its success on a foundation of consensus, stable consensus is likely to obtain only where the galvanizing force of a strategic design is manifest. The consensus of which we speak is not a compromise solution to a difference of opinion nor an intellectual herding phenomenon. It is, instead, a condition of more-or-less spontaneous unanimity on basic principles, values, and beliefs, arrived at through a dialectical process of give and take.

The linkage between strategy and consensus is no less essential in totalitarian than in democratic regimes, although the numbers that must be party to the consensus and the means employed for its achievement may differ markedly. Thus, a totalitarian regime may be able to act with greater efficiency and alacrity than a democratic regime but with far less assurance of a sustainable base of social cohesion and national will. The consensual basis for strategy assumes heightened significance in this country due to our relative lack of geopolitical sense, and our general historical illiteracy, in comparison with our most resolute adversaries.

What power is to strategy, philosophy is to strategic thinking. Therein lies a particular problem for most Americans. To the extent that there is even a shred of truth to the claim that the United States has no strategy, nor even much appreciation for the concept, it is due in large measure to our lack of acumen in the exercise of power. Perhaps because we have always been a land of plenty and able to compensate for unpreparedness or indifference with vast resources, perhaps because of our position of relative geographic isolation distant from the constant threat of hostile incursion (the nuclear specter notwithstanding), or perhaps because we simply have misinterpreted the reasons for our successes in two world

wars, we have never become comfortable with power—what it is or how to use it. Our performance in the international arena has been marked principally by repeated failure and only rarely by even evanescent success.

At root, the problem is our inability or unwillingness to think strategically. We do not look at the big picture and attempt to discern underlying patterns and relationships. Instead, we feel much more comfortable dealing with "manageable" particulars. We do not look to the long term and attempt to draw the link with the lessons of history. Instead, we are creatures of the here and now. We do not accept contradiction, paradox, and uncertainty as organic features of strategic interchange. Instead, we abjure nuance and seek to explain an inherently complex world in simple, understandable black-white, either-or terms. Does this reflect a relatively recent, random intellectual mutation, or does the general intellectual flaccidity that has produced our strategic incapacity have deeper roots?

Can We Improve?

With a cynicism bred by a distinguished career of studying history, Barbara Tuchman observed that "wooden-headedness" is a factor that plays a remarkably large role in government. Wooden-headedness consists of assessing a situation in terms of preconceived notions while ignoring or rejecting any contrary signs. It is acting according to wish while not allowing oneself to be confused by the facts. It is the refusal to learn from experience. Obviously, wooden-headedness is not endemic to any particular regime or form of government. In fact, with history as our guide, we may safely conclude that it is a phenomenon of near-pandemic proportions, fully evident whenever and wherever governments are confronted by situations that are other than routine in nature. Considering the extraordinary demands that the contemporary international environment has placed on us, we must ask ourselves whether wooden-headedness in

the affairs of state is a condition we any longer are willing to accept.

This question is especially pertinent to a United States that has experienced perhaps more than its share of failures abroad in recent years. Some would argue that this disturbing state of affairs is to be expected in light of what Tocqueville characterized as the fundamental incompatibility of democracy and the effective conduct of foreign affairs. But such a position warrants more than a little skepticism. Leon Wieseltier, for example, in a *New Republic* article entitled "Democracy and Colonel North," attacks those who subscribe to the proposition that there is a kind of zero-sum relationship between moral integrity and political efficiency, that the perfection of American democracy results in the imperfection of American foreign policy.

Tocqueville provided probably the most lucid and authoritative expression of this tension when he averred that whereas democracy tends "to obey its feelings rather than its calculations," an aristocracy "does not yield to the intoxication of thoughtless passions. An aristocratic body is a firm and enlightened man who never dies."

Supporters of this position, so-called neo-Tocquevillians, must in Wieseltier's view, do two things before they start tinkering with the time-honored methods of American statecraft. First, they must demonstrate that democracy's judgment about matters such as selling arms to Iran was inferior to the judgment of those who wanted to overlook democracy. Second, they must demonstrate more generally that the position of the United States in the world has been weakened by the vigorous exercise of American freedoms, particularly by the freedom of the press.

Wieseltier's remarks are an exquisite reminder that we would be well advised not merely to reflect on our constitutional heritage, but to do so in conjunction with a serious reappraisal of the ideas and values embodied in the other seminal document that shared the 1987 anniversary year, the National Security Act. In light of the

events of the Iran-contra affair, neither document can nor should be judged in isolation from the other.

As a people, we tend to revere the Constitution and the principles it embodies. In fact, we manifest those same propensities once noted by Jefferson:

> Some men look at Constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.

If we are wont to revere the Constitution and the Founding Fathers, while our experience of late betrays a pronounced lack of acumen in the conduct of foreign affairs, does this suggest some failure of constitutional content, a fundamental incompatibility between constitutionality and national security, or simply a failure of contemporary interpretation?

To be sure, the Founding Fathers did not speak directly of strategy or strategic thinking. This should not necessarily be construed, however, as indicating that the Founding Fathers had absolutely no appreciation of such matters. The Founding Fathers spoke in terms that, if taken out of context or not judged in terms of their underlying subtlety or sophistication, seem to contribute little—and in fact may be almost antithetical—to a strategic orientation. But these were men who represented a degree of collective intellectual candlepower that has not been seen since in the corridors of American government.

It seems appropriate, therefore, to conclude that where the ideas and ideals embodied in the Constitution do not provide a very clear guide to strategy and strategic thinking, it may be due more to our own failures of interpretation—especially considering our ingrained sense of literalism—than to failures in founding thought. The Founding Fathers were equipped and in a position to draw the link between what they said and what they left unsaid. We have only their words to interpret in light of our own values, experiences, and capabilities. If we do

not draw from the Constitution all that we could or should, we would do well to look to our own intellectual incapacity as the reason.

Whatever might be said today about the innate lethargy and apathy of the American people, or about the failure of our educational institutions to provide a firmer foundation of civic virtue among our citizenry, it is government that, in the final analysis, must shoulder the blame for failing to nurture the intellectual capacities of the nation. Government actually has suppressed the quality of discourse on matters of state by refusing to engage the public in direct and active dialogue.

Ours is a politics of power, not a politics of participation. Rather than giving citizens primary responsibility for governing themselves directly, our system demonstrates a clear preference for granting the most important governmental responsibilities for making authoritative decisions to a select few—acting ideally in behalf of, but with increasing frequency in spite of, the citizenry. The result is what one perceptive student of the subject, Benjamin Barber, has characterized as "thin democracy." And representative democracy *is* thin democracy. It yields neither the pleasures of participation nor the fellowship of civic association, neither the autonomy and self-governance of continuous political activity nor the enlarging mutuality of shared public goods—of mutual deliberation, decision, and work. Barber notes:

> Obvious to that essential human interdependency that underlies all political life, thin democratic politics is at best a politics of static interest, never a politics of transformation; a politics of bargaining and exchange, never a politics of invention and creation; and a politics that conceives of women and men at their worst (in order to protect them from themselves), never at their potential best (to help them better become better than they are).

Conclusion

Representative democracy has sustained itself for so long because it has always been to the personal advantage

of those in power or with access to power to maintain the demarcation between governors and governed under the guise of democracy. The growing complexity of the world around us has obscured such personal motives, for it is all too easy to accept on its intuitive merits the arguments that coping with this complexity requires a degree of experience and expertise that only those who govern can be expected to possess. In point of fact, many if not most of those who govern owe their positions less to experience and expertise than to political connections. Moreover, once in office, these individuals are forced to narrow rather than broaden their perspective in order to ensure personal survival and success. Thus, to a large extent, coping with the complexity of the governing environment quickly shows itself to be beyond the ken of those who govern every bit as much as it is believed to be beyond the ken of the polity at large. Representative democracy therefore is demonstrably ill-equipped to provide the strategic orientation that the modern world requires.

What is needed is what Barber characterizes as *strong democracy*. Strong democracy rests on the idea of a self-governing community of citizens who are united less by homogeneous interests than by civic education and who are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions rather than their altruism or their good nature. As idealistic as this may sound, it is an orientation that we must assume if we are to survive and prosper—as a nation, and more generally as a global community. The technology is available to make the idea work, if only those in power will acknowledge that they have more to gain than to lose by such a proposition.

Almost a decade and a half ago, historian Richard Morris noted very perceptively that "The impact of immediacy created by TV has placed a premium not on reflection and reason but on the glib answer and the bland statement. The politician is concerned with public relations, not with public principles." Television is not the problem, of course; it is but the medium that accentuates

government's deeply entrenched unwillingness to engage the public in meaningful discourse. Only when such direct engagement occurs and is sustained over time will the quality of public understanding and discourse improve, thereby enabling us as a nation to achieve the consensus that is so vital to effective strategy-making but that is so lacking today.

In his book, *The Power of Public Ideas*, editor Robert Reich observes that policymaking should be more than and different from the discovery of what people want. It should entail the creation of contexts in which people can critically evaluate and revise what they believe. The responsibility of government leaders, he notes, is not only to make and implement decisions responsive to public wants. A greater challenge is to engage the public in an ongoing dialogue over what problems should be addressed, what is at stake in such decisions, and how to strengthen the public's capacities to deal with similar problems in the future. Nowhere is this more telling and true than in the realm of foreign affairs.

Only when government engages the public in productive and regular dialogue will the populace assume the civic responsibility of improving its understanding of global affairs. Only when such improved understanding is clearly evident will those who govern feel compelled to elevate their own thinking and behavior. And, only when those in power are forced to more elevated levels of thought and deed will the nation show itself capable of coping with the world it now faces.

In matters of strategy, democracy (true democracy, that is) is a decided strength, not the weakness it is commonly presumed by some to be. We will grasp this fully only when we dig into our constitutional roots and attempt to adapt the rich intellectual legacy left us by our forefathers to the contemporary affairs of state. Given our anti-intellectual propensities, the task will not be easy. As Herbert Spencer once observed, "No philosopher's stone of a constitution can produce golden conduct from leaden instincts."

FOREIGN POLICY AND CONGRESSIONAL/ PRESIDENTIAL RELATIONS

By ROBERT JERVIS
Columbia University

I know of no safer depository of the ultimate powers of the society but for the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion by education."

—Thomas Jefferson

The President has the constitutional right, and in fact the constitutional mandate, to conduct foreign policy.... I felt that we were on strong legal ground with what we were doing, and it was consistent with the President's policy, and I simply didn't want any outside interference from Congress.

—Rear Admiral John Poindexter

THE IRAN-CONTRA HEARINGS ARE MERELY THE LATEST evidence for the old adage, "If you want to eat in a restaurant, don't look into the kitchen." Watching American foreign policy being made has never been a pretty sight, even when the results are better than they were in this case. A number of questions recur which are intriguing and important enough to invite if not demand continued attention. Has Congress gained excessive power over foreign policy? To what extent are the currently embittered relations between the executive and legislative branches

I would like to thank James Kurth for comments.

attributable to particular personalities and issues, and to what extent are the causes to be found in more deeply rooted factors? Can we connect problems and deficiencies in the way foreign policy is made with bad policies, and, conversely can we find links between more appropriate processes and better outcomes? To what extent are we facing a trade-off between constitutional and civil liberties and an effective foreign policy? If government pluralism either should not or cannot be reduced, how can it be reconciled with effective and sustained foreign policy?

Efficiency and Effectiveness

Most of us find the foreign policy processes revealed in the Iran-contra affair upsetting not only because of questionable constitutional procedures but also because we intuitively feel that bad processes lead to bad outcomes. It stands to reason that there should be such connections, just as it stands to reason that there should be a connection between rationality and wise decisions at the level of each individual. But in fact it is far from clear that this is the case. The effort to establish the validity of the proposition would confront conceptual and empirical obstacles. We would have to establish valid and reliable indicators of both good processes and good outcomes. But these judgments are notoriously difficult and subjective. One effort along these lines has been made, and it does show a strong connection between process and outcome.[1] But the methodological problems are severe enough to make such findings tentative at best. For example, although the people who judged the outcomes were different from those judging the processes, assessments of both may have been subjectively biased by the feeling that they are connected.

This is a general problem that complicates our understanding of foreign policy and policymaking. If we believe that the process was flawed, we are likely to judge the outcome more harshly. Conversely, if we believe that the outcome was successful, we may be more likely to

evaluate the process favorably. For example, the American decisionmaking procedures in the Cuban missile crisis generally are seen as a model of excellence. A great deal of information was gathered, many competing policies were considered, disagreements were permitted or even encouraged, institutional biases were minimized, and people felt free to change their opinions. Although there is something to this, I wonder whether this assessment is not caused in significant measure by the fact that we know that the outcome was a favorable one. Had the result been war or American humiliation, I think we would see the process very differently. Then we might focus on the extent to which the President failed to consult Congress and outside experts. Some might fault Kennedy for not providing sufficient leadership to his advisors; others would point out that the most important question was decided immediately by Presidential fiat—in the first meeting Kennedy declared that the presence of the missiles was unacceptable, thereby ruling out consideration of a range of policies and alternatives.

If hindsight indicated that using military force would have been appropriate, we would be quick to point out that the exploration of military options was abbreviated and biased. The reasons why the Air Force believed that such a massive strike was necessary—and might not destroy all the missiles—were not carefully probed. If the crisis had ended in a war, we probably would fault the participants for having been too quick to resort to the blockade and having paid insufficient attention to diplomacy. Similarly, if the recent Iranian policy had succeeded, even critical observers would place greater weight on the advantages of secrecy and a policy carried out by a small and united group of people. What now seems like naive amateurism would be seen as gifted outsiders refusing to accept the caution and conventional wisdom of the professional bureaucracy.

The links between processes and outcomes can also be examined by comparisons between countries. Some countries may have more effective foreign policies

because they have more efficient processes for making foreign policy. This line of argument was especially prevalent in the 1950s when it was generally believed that the American form of government was unsuited for foreign policy. There was something like a consensus that democracies were at a disadvantage as compared with dictatorships because the latter were less constrained by public opinion, bureaucracies, and legislatures. It was also believed that among the democracies, Britain was able to follow a much more coherent and carefully crafted policy because of the nature of its domestic political system.

The evidence is not convincing. Kenneth Waltz has shown that a comparison between the United States and Great Britain is not all to the former's disadvantage.[2] Many of the strengths of the British system have a dark side. The fact that British Prime Ministers and Foreign Secretaries must rise through the ranks guarantees that they will be experienced, as Jimmy Carter and Ronald Reagan were not. But new perspectives and policy initiatives may be more likely with decisionmakers who have not been socialized into the established perspectives and ways of doing things. Similarly, Britain's greater party discipline allows the Prime Minister to work through her party. But the other side of this coin is that there are sharp limits to her freedom of action. In contrast to an American President, Mrs. Thatcher cannot disregard a negative vote in the Legislature or draw on members of both political parties to construct different supporting coalitions on each different issue.

A third dimension of the difference between the two systems has received renewed attention over the past few years. When a new administration comes to power in Britain, only a handful of top decisionmakers are replaced; the permanent officials remain at the highest levels. The American system, by contrast, lacks continuity and long-term memory. The newcomers not only find it difficult to reconstruct the reasons for the current policy, but also are ignorant of the detailed and complex evolution of our relations with other governments. There is a

great deal of validity in this criticism. American negotiators often are handicapped by knowing little of the details and history of the issues. But one does not have to be a supporter of the Reagan administration to realize that there often was substance to its complaint that the permanent bureaucracy resists innovation and is likely to propound views that are excessively narrow and constrained.

It is also now easier to challenge the view that dictatorship lends itself to effective foreign policy. This argument was fed both by the apparent successes of the Soviet Union in the 1950s and by an idealized view of the way in which that country made foreign policy. Starting with the latter, it was believed that internal constraints were minor in the USSR, that information flowed to the highest levels without distortion, that policy decisions were similarly implemented without impediments, that continuity was easy to maintain, and that rationality and not emotion guided policy. There certainly is something to this, but this picture is too stark, even for Stalinist Russia. Politics and coalition building can be minimized—but not eliminated. Furthermore, dictatorship *is likely to* restrict and distort the flow of information. When the person who reports deficiencies in the policy is likely to lose his job if not his life, accurate reporting will be rare. Furthermore, while an omniscient dictator might be able to maintain a well-crafted and coherent policy, the system will magnify any limitations on his time, energy, or competence. As Lindblom and Simon pointed out 30 years ago,[3] intellectual and political limitations on human decisionmaking mean that bargaining will often produce a better decision than that which can be provided by a single individual who tries to integrate all the relevant values.

The argument for the relative efficiency of dictatorships was also spurred by the conventional view of the foreign policies of the superpowers in the 1950s. In brief, the Soviet Union seemed to be doing very well and the United States very badly. Hindsight allows us to correct this picture. While it is still possible to argue that the

Russians did well considering their enormous weakness, we can now see that many trends which seemed to benefit them were, in fact, only temporary and that Eisenhower's foreign policy did not deserve all the scorn it received from commentators and academics. In the mid-1950s, it seemed that Soviet power and influence were steadily growing; the economy was believed to be so efficient that it would soon surpass that of the United States. Soviet diplomacy was penetrating the neutral countries and was expected to dominate the African states as they received their independence. Soviet military power was also believed to be increasing—a judgment Khrushchev's generals might have disputed—and the records of NSC meetings are permeated with the great fear that this would permit the Soviets to make major gains throughout the world.[1] American policy, by contrast, appeared weak and fumbling. Our allies criticized us, neutrals scorned us, economic, military, and moral strength seemed to be slipping away. Hindsight again gives a different picture. The United States seems to have been able to consolidate its position of strength, even if several long-run problems were undetected or ignored.

Of course comparing the foreign policy performances of the United States and the USSR is very difficult because the two states are in very different situations. Most notably, the United States is much stronger than its adversary and has the enormous advantage of generally seeking to preserve rather than alter the status quo. But at least in a few incidents we see American successes and Soviet failures that cannot be attributed to the differences in the tasks or the difficulties that are faced. Events in the Philippines provide a nice example. It was surely not easy for the United States to have eased Marcos out, helped avoid a civil war, and gained the good will of Aquino and the general population. The Soviet Union, by contrast, gave Marcos public support just as he was being forced to leave the country.

These comparisons are only impressionistic. But they call into question the belief—which I believe is widespread—that the United States could follow a more effective foreign policy if it only had a more disciplined system of policymaking.

Substance and Process

The discussions of the Iran-contra affair remind us how difficult it is to disentangle people's views of the substance of an issue from their views about the process that produced it. By and large, although a great deal of attention is paid to the process, people's conclusions are driven by the substance. That is, people who oppose the President's policy in an area, either from partisanship or from judgments of the policy's results (and it is also interesting that these two generally coincide), generally condemn the process that produced the policy. The President's defenders are less critical of both the policy and the process. Put more broadly, arguments about Presidential versus congressional power rarely occur in the abstract. Instead, they arise out of the issues of the day. Furthermore, the position that one takes on how much power the President should have is very strongly influenced by whether one agrees with the President's policy or not. Thus we find that conservative Republicans who railed against Presidential power in the first 15 years of the Cold War now call for strong Presidential leadership; liberals who argued that fighting the Korean war did not require a congressional declaration of war and who called for Presidents to lead the United States into an active policy now see the Constitution as requiring a large role for Congress. Similarly, it was Senator Taft and his supporters who claimed that an activist President and wide-ranging foreign involvement could curtail domestic civil liberties, a fear that is now voiced by the liberals.

These connections between approval of the substance of the President's policy and judgments of the appropriateness and legitimacy of the processes mean

that it is difficult—both logically and psychologically—to judge the latter in the abstract. All the elaborate justifications for the constitutionality and wisdom of checks and balances as applied to foreign policy and the equally well-developed justifications for Presidential power may be rationalizations for conclusions arrived at on other grounds. One pattern is clear: views on processes are closely linked to beliefs about the extent to which the world situation requires an activist foreign policy. It is no accident that proponents of checks and balances tend to want a restrained foreign policy and that those who believe that the United States must act quickly, flexibly, and constantly in world politics call for greater Presidential power. It is much easier for Congress to prevent the President from doing something than it is for it to develop a policy of its own or force the President to act.

This helps explain the reversal of liberal and conservative views since the beginning of the Cold War. Conservatives have come to accept the beliefs of Truman and his colleagues that the United States must contest Soviet moves at all points on the globe. Liberals have not only come to appreciate Senator Taft's concerns for the domestic consequences of foreign policy activism, but have also developed a more benign view of the international environment and the Soviet Union. Conservatives, thus, now tend to look with favor on Presidential power in foreign policy and liberals have become the defenders of Congress.

But this picture should not be drawn too starkly. At times Congress *can* initiate policy or force the President to act rather than merely prevent him from acting. Congress forced President Truman to aid China; Senator Russell and his colleagues created a constitutional confrontation in an attempt to force President Kennedy to buy the B-1; congressional pressure has led to greater aid to Israel than several administrations have wanted; congressional votes have not only blocked some administration initiatives toward Greece and Turkey, but have

established policy in this area; Senator Helms has not only sought to prevent the administration from developing better relations with Mozambique, but has tried to make it recognize the rebels. In principle, Congress could force greater activism on a President by holding any number of bills hostage until he complied.

But if it is incorrect to state as an iron law that the greater the congressional involvement, the less the foreign policy activism, in fact this is the usual pattern. In domestic affairs as in foreign policy, it is easier to block than to initiate. This is especially true for Congress, which is rarely united, and is even less likely to be so when it opposes the President. The cliché that 535 people cannot have a foreign policy is founded on a basic fact. Of course the contrast with the executive branch should not be exaggerated. The latter is often internally divided, and when it is, the President will find it difficult to construct and enforce his policy. Furthermore, as the efforts of Senator Helms remind us, on some occasions a single Member of Congress can force his preferred policy through. But when Congress is divided, it will usually be easier to get agreement to refrain from a particular activist policy rather than to adopt a positive course of action.

Is Increased Presidential Power Necessary?

It can be argued that even if the constitutional prescriptions of checks and balances originally applied to foreign policy, America's involvement with the world has made this approach impossible. The Founding Fathers never foresaw a nuclear-armed Soviet Union. They also did not foresee a large and competitive industry of newspapers, let alone of radio and television networks and a strong network of interest groups, which; if blocked by the executive branch, could work through Congress in order to gain their narrow and particular interests. Furthermore, the Congress to which they granted a significant role in foreign policy was small and cohesive. It did not have large and aggressive committee and personal staffs eager to look into every detail. Thus at the very

time that policy-making requires speed, agility, coherence, and secrecy, the executive branch is faced by stronger and more intrusive domestic actors in the form of Congress, the media, and interest groups. If American policy is to be effective, the executive branch must have quite a bit of leeway.

But while this view may be correct about the requirements of today's world, it is too quick and stereotyped in its treatment of the past. The Republic did not lack for external enemies in its first years, as the burning of Washington reminds us. To be sure, throughout most of the rest of the nineteenth century, foreign threats were much more distant. But the Constitution was not designed with such an easy world in mind. Even less is it the case that the newspapers with which the founders were familiar were gentle and respecting of governmental authority. The strongest terms in which recent Presidents have been criticized are mild compared with the rhetoric of the late eighteenth century. Political life was much rougher then; tactics and charges that are now considered irresponsible and illegitimate used to be common.

Nevertheless, the world has certainly changed in ways that may call for greater Presidential power. In many areas, secrecy is more important—and probably more difficult to achieve—than it was in the past. The level of foreign involvement is not only high, but unremitting. As the pace of communications and travel increases, the time permitted for decisions decreases. And, perhaps most important, a misstep in relations with the Soviet Union could lead to the end of the country.

The need for secrecy, however, needs closer examination. Although no one would dispute that many things need to be kept secret within the government, often the importance of secrecy is simply assumed rather than carefully argued, let alone demonstrated. For example, President Nixon believed that quite serious results would follow if the bombing of Cambodia became public. But the consequences were in fact quite minor and the only significant damage was caused by keeping the policy

secret from Congress in the first place. We usually believe that covert actions, if they are to be effective, must be kept secret. And while this is often true, analysts might have said the same thing about the American program of aiding the contras were it not for the fact that this program first gained the new status of an "overt covert" operation and then became completely overt. Perhaps other operations could have survived in the open as well.

Throughout the Cold War, the Soviets have gained the services of well-placed spies. These have presumably done great harm, especially in the areas of military procedures and American spy networks in Eastern Europe and the USSR. But when we look at the number and range of spies the Soviets have employed, what is most striking is the lack of damage. Donald Maclean sat in on the supersecret meetings that led to the establishment of NATO. The records of these meetings and the associated documents were so sensitive that they were not transmitted to all the European capitals, but instead were sent only to London where the other Europeans had to go to read them. Perhaps by gaining access to this material, the Soviets were more able to anticipate some Western diplomatic moves. But if so, the effects were hard to detect at the time. Furthermore, in this case and perhaps in many others, it may have been to the West's advantage for the Soviets to hear our innermost thoughts. For if Burgess, Maclean, and the other spies reported accurately, the Soviet leaders would have learned that the United States was generally defensive and motivated primarily by a fear of the Soviet Union. (But they would also have learned that this fear sometimes led to the consideration—how serious it is hard to say—of preventive war.) Of course we cannot tell what was actually reported or what inferences the Soviet leaders drew. But it may have proved quite useful to have them realize both that we were primarily concerned with preserving the status quo and that we thought that if the Soviet menace grew too great, we might have to strike first.

Even when secrecy is desirable, it may be purchased at an excessive cost. A number of policies have failed because they were based on illusions that could have been shattered had a larger number of people been consulted. The secrecy surrounding the Bay of Pigs was so great that the plans were never carefully scrutinized by military experts. The political assumption that an anti-Castro uprising was likely was similarly never examined by intelligence analysts who could have dismissed it as a fantasy. Similarly, if the intelligence estimate that was instrumental in triggering the Iran-contra affair had been seen by many experts, they might have questioned the assertions that Soviet influence was growing, that an internal power struggle was likely in the near future, and if we did not act immediately there was a great danger that the country would fall under Soviet influence. The President was also supposedly influenced by other reports that indicated that Iraq was winning the war with Iran. Policy is harmed when analyses like these are kept secret and so free from rebuttals.

Third, it is far from clear that limiting debate to the executive branch does a great deal to preserve secrecy. As far as we can tell, there have been no spies in Congress. Furthermore, it does not seem that many leaks emanate from that branch. Of course increasing the number of people who know about a policy does increase the number of people who can reveal it. But one would need to be much more precise than this before concluding that the need for secrecy requires that a great deal of information should be kept from Congress.

When debate on crucial issues is confined to a small group within the executive branch, the proper foundations for public support cannot be constructed. In addition, the danger of quick and unfounded consensus is great, especially if the President himself takes a position early in the discussion. Of course the President may be challenged by his own advisers, even when his feelings are strongly expressed. The minutes of Eisenhower's NSC meetings reveal a refreshingly high level of

disagreement as many of the members were willing to argue with the President.[5] But Members of Congress, who are less beholden to the President, are even more likely to challenge him. Furthermore, when Presidents can keep the issue from Congress, they may be tempted to consult only a few friends and advisers. The result will be to diminish the range of opinions that are heard and the vigor of the discussion that ensues.

An important example was the excessive secrecy that surrounded atomic weapons in the early years after World War II. Although the release of the Smyth report gave experts and the public (and the Russians) a great deal of information, after that very little was released.[6] As a result, not only was the public ill-served, but debate within the executive branch was inhibited. At a time when the most basic issues of American policy toward nuclear weapons needed a thorough airing, the concern with secrecy ensured that this would not happen. The most recent example is one part of the origins of the Iran-contra affair. While Reagan's concern for the hostages was understandable and even admirable on the human level, had more people been consulted they probably would have shifted the focus of the debate to the broader and more important political issues involved, perhaps leading the President to see that the disadvantages of his policy far outweighed its probable gains.

Congress and the Presidency

Separation of powers ensures that the legislative and executive branches will quarrel over their respective rights and powers. If for no other reason, it is therefore foolish to believe that anyone could set down rules that would determine for the indefinite future how the two branches should conduct foreign policy-making. Nevertheless, a few opinions may be ventured. First, to return to the point made earlier, substance and process are linked. The degree to which Congress will grant the President discretion varies directly with the extent to

which most of its members agree with the policy being followed. Thus Congress does not insist on debating US policy toward the Afghan rebels nor does it attach restrictive amendments to appropriation bills. Indeed, as far as one can tell from the public record, it does not even insist on detailed reporting. The contrast with Central America is glaring, and the reason is obvious; Congress sees that aiding the Afghan rebels is clearly in the national interest but is not convinced that this is true for the contras. Similarly, Congress has placed restrictions on the executive branch in the testing of nuclear explosives, anti-satellite weapons, and ABM systems. But it has not micro-managed weapons systems it deems desirable.

A second point is closely related. Congress only asserts itself against the President's policy when large and vocal segments of the population doubt the wisdom of those policies. To the extent, then, that the President seeks to persuade if not follow public opinion, he also must be concerned with congressional reaction. In many cases, it is appropriate for the President to act in spite of public disagreement. But he must ask himself how long such a policy can be sustained. In some instances, the policy may gain greater support as it is implemented and its effects become apparent. But when this is not true, it is superficial to focus on congressional opposition and ignore the public discontent that underpins it.

Even if the President can remove a number of policy areas from congressional meddling, he cannot escape the difficulties imposed by the budgeting process. In only a few cases can the President implement his policy merely by making speeches. He can do this, for example, when he wants to set the tone of American policy toward the Soviet Union by his speeches. But most policies call for large sums of money, and keeping Congress out of his way will not automatically produce the votes needed for the required appropriations. Although the extent to which Congress can guide policy by riders to appropriations bills is not clear,[7] Congress can effectively block many initiatives by refusing to provide the funds. Thus

while Reagan may have been able to deny Congress the right and ability to contest his interpretation of the ABM agreement, he could not force it to spend money for tests that it viewed as objectionable, either because they violated the treaty or because they were seen as unwise for any other reason.

WHAT CAN CONGRESS DO BEST? Congress can do some things particularly well. Because it is not as directly responsible for foreign policy as the President is, it can often act as the country's conscience, pointing out reprehensible behavior by countries with which our relations are sensitive. Reactions to recent events in China provide the latest example. Another role that Congress can perform is to indicate how different values should be weighted when they are in conflict. The inability to fine-tune a policy and the drawbacks of micro-management do not arise here. Rather, Congress indicates which value is most important in a given situation and which values can be sacrificed. This seems to be what Congress is doing on the question of aid to Pakistan. Everyone agrees on the importance of nonproliferation and the value of providing support to Pakistan. Unfortunately, these two considerations conflict with each other and some sort of trade-off is inevitable. For a variety of reasons, the President comes down more strongly on the side of the latter than on the former. Congress disagrees, and while one can argue as to who is correct, the legitimacy of the congressional role seems clear. There is no reason why the executive branch should be better suited to judge this question than the Legislature. Indeed, in contradiction to what is often alleged to be the normal pattern, here it is Congress which is looking to the long-run and the executive that is being swayed by the immediate and particularistic concerns. When taking a stand that conforms to general American foreign policy hurts a country with which the United States has good relations, that country usually is able to make its objections strongly felt within the executive branch. Furthermore, the country desks that are responsive to the friend's interests usually are

stronger than the agencies seeking to uphold general principles. The likely result is that the executive branch's policy will be strongly influenced by the ally's concerns. Congress, on the other hand, lacks this structure of internal constituent groups and is less likely to be captured by the foreign country or its agents within the government.[8]

Conclusion

The Iran-contra affair is only the most recent evidence for the generalization that when the executive branch feels that the Congress will oppose it, it will try to minimize congressional involvement. Although the extent to which the executive branch not only kept information from the Congress but actively deceived it is unusual, the general pattern is not. While such behavior is understandable, sustained and effective policy requires at least the acquiescence of Congress. The President and his colleagues must then learn to live with, if not to accept, the judgment of the coordinate branch.

For its part, Congress must realize that it cannot control or even concur in the details of American foreign policy. (Indeed, it is questionable whether the President can do so.) In fact, under most circumstances, Congressmen are more than willing to leave a great deal to Presidential responsibility, thereby relieving them of the blame when things go wrong. Under ordinary circumstances, the President's prestige is such that Congress is willing to oppose him only when the pressures to do so are great. But when Congress does oppose the President, the national interest usually is best served when it concentrates on the areas of its comparative advantage, especially the general thrust of the policy rather than its specifics. Furthermore, Congress—and the nation at large—must live with the fact that no matter how vigilant it is, the President has the power to commit American prestige. He can announce that we must protect Kuwaiti shipping in the Persian Gulf or that the American national interest requires supporting the contras.

Congress may be able to block the moves that would be necessary to implement these policies, but the international and domestic environment will have been altered by the President's statements. Congress may decide that it is unwise to follow the President, but there is nothing it can do to stop him from trying to lead the way, and thereby from partially setting American policy.

Conflict and compromise will continue to characterize the making of American foreign policy. The interests and perspectives not only in the country at large but even within the executive branch are too diverse to permit certainty and neatness in the processes or the outcomes. The elusive qualities of trust and good will within and between the two branches are critical if the system is to serve the country—and the world—well. When Donald Regan asked why Admiral Poindexter had approved using the profits on the Iranian arms sales to support the contras, he replied: "Well, that damn Tip O'Neill ... the way he's jerking the contras around.... I was just so disgusted.... I didn't want to know what [Oliver North] was doing."[9] In a democracy, this is a recipe for disaster.

Notes

1. Gregory Herek, Paul Huth, and Irving Janis, "Decision Making During International Crises," *Journal of Conflict Resolution* 31 (June 1987): 203-26. Also see Herek, Janis, and Huth, "Quality of US Decision Making During the Cuban Missile Crisis," *Journal of Conflict Resolution* 33 (September 1989): 446-59. For some criticisms, see David Welch, "Crisis Decision Making Reconsidered," *Journal of Conflict Resolution* 33 (September 1989): 430-45.

2. Kenneth Waltz, *Foreign Policy and Democratic Politics* (Boston: Little, Brown, 1967).

3. Charles Lindlom, "The Science of Muddling Through," *Public Administration Review* 19 (1958): 79-89; Herbert Simon, *Models of Man* (New York: Wiley, 1958).

4. U.S. Department of State, *Foreign Relations of the United States, 1952-54*, vol. 2, *National Security Policy* (Washington, DC: Government Printing Office, 1984).

5. *FRUS, 1952-54*, vol. 2, *National Security Policy*.

6. Henry Smyth, *Atomic Energy for Military Purposes* (Princeton: Princeton University Press, 1945).

Would it have been constitutional for Congress to have tried to curb Reagan's policy in the Persian Gulf by an amendment which would have prevent any monies being spent to support naval operations there?

8. This will only be true, of course, if the foreign country lacks former nationals or sympathizers who are organized and vocal in congressional districts.

9. Quoted in the *New York Times*, July 31, 1987.

NATIONAL SECURITY—SHARED AND DIVIDED POWERS

By HOWARD E. SHUMAN
National War College

I think the legislative veto in the War Powers Resolution can be distinguished from other legislative vetoes.
—Louis Fisher

ON THE 200TH ANNIVERSARY OF THE SIGNING OF THE American Constitution, the conflict that took place over what powers should be assigned to and exercised by the President and Congress is alive and well. It is an enduring problem that flares up and then recedes from time to time. It is the struggle between Hamilton and Madison, which Madison won initially but against which the forces of Hamilton continue to contend. It is the struggle between those who are content with or strongly advocate the division of powers and the shared powers between the President and Congress, and those who would prefer to move toward some form of parliamentary government or a more unitary state.

It is a recurring struggle, which surfaces most often during the twilight of a President's service or during the days of a weakened Presidency. Senator J. William Fulbright proposed moving towards a parliamentary system when he felt President Truman's power was insufficient for the times. At the end of the Carter administration forms of the parliamentary system were advocated by his White House Counsel and by the President himself in his advocacy of a single six-year term during

which he would be free from the constraints of public opinion or the need to consider the politics of the coming election. The Nixon administration, after its 1972 electoral victory, exercised the "Imperial Presidency" and without authorization or legislation impounded funds, put a moratorium on more than a dozen domestic programs that had been passed by Congress and signed into law, and transferred funds from foreign aid accounts to military accounts for purposes that had never been authorized. What President Nixon did or tried to do illegally and unconstitutionally, President Reagan did legally and constitutionally in his first two years when he reordered priorities—a cut in domestic spending, an increase in military spending, and a major reduction in taxes—by winning majority votes in each House of Congress for his programs.

In the twilight of the Reagan administration, there were specific calls for moving towards a parliamentary system or a more unitary state by at least two different groups. The purpose of their effort was to change the relationships between the President and Congress with respect to their shared and divided powers. I examine this movement and both its organized and unorganized advocates and then illustrate some of the consequences and issues in two of the several contending areas, namely in the areas of war-making and foreign policy.

The Hamiltonians

One group of modern Hamiltonians wishes to increase the power of the President explicitly, by argument, reason, and constitutional means. This group sees an excessive amount of "gridlock" allegedly caused by the diffusion of power in Congress, the loss of power by congressional leaders and committee chairmen, and the decline of the party system and party discipline in both Congress and the country. They have made a series of proposals and hope to obtain them legitimately through party resolutions and changes, legislation, and by constitutional amendments. These proposals were put forward

after what was said to be a series of failed Presidencies—Johnson, Nixon, Ford, and Carter.

Another group of Hamiltonians wishes to gain changes in the expansion of Presidential power by implicit means; the members' arguments, taken together, essentially urge a plebiscitary Presidency (exemplified in modern times by Charles de Gaulle). This group emerged, although unorganized and informal, after the highly successful first six years of President Reagan and the frustration following the elections of 1986 and the "Irangate" controversy. Some group members assert that the President, and the President alone, should exercise exclusive authority in at least four vital areas: the power to go to war; the power both to initiate and carry out foreign policy; the power to appoint officials to the highest posts in the country with only the *pro forma* advice and consent of the Senate; and the determining of domestic budget policy without more than minor modifications by the Congress. The advocates of these positions assert, as did the supporters of Franklin Roosevelt in 1932 and Richard Nixon in 1972, that as a result of an overwhelming electoral victory the President has a mandate to carry out his policies in these areas. Having won a plebiscite, the President's foreign and domestic policies should be acquiesced in by Congress.

What the more strident advocates of these positions are seeking is a more unitary state as practiced in modern parliamentary democracies. The British Prime Minister has prerogatives not available to the American President. Mrs. Thatcher went to war in the Falklands without a declaration of war or vote of Parliament. She and her Foreign Secretary need not get the advice and consent of two-thirds of the Parliament for treaties nor a majority vote for the appointment of her Cabinet, judges of the High Court, or archbishops. Once her budget is revealed by the Chancellor of the Exchequer, it is for all practical purposes accepted without major changes. The "i's" are dotted and the "t's" are crossed. The power she exercises makes every modern President envious indeed and leads

many of his supporters, understandably, to advocate a similar state of affairs. What a luxury it would be for a President to have a docile following in Congress, unwilling to criticize or vote against his policies because that would ensure a new election or the loss of his or her seat by the intervention of the central party headquarters.

This is not a partisan or party matter. It is in part an accident of the Presidential cycle. One doubts if those pushing the views today would be so eager if there were now a George McGovern, Ted Kennedy, or Walter Mondale administration. It is the position of the supporters of most Presidents, particularly in the waning years of their Presidency. But it also is argued by Presidents and their followers throughout a Presidential term with respect to certain powers and certain issues.

Richard Nixon vetoed the War Powers Resolution. Every President since Nixon has opposed it and has failed to carry out its specific provisions. Some of them and their supporters have proclaimed it unconstitutional. What modern Presidents and their entourages seek is to exercise in relatively tranquil periods the powers that Lincoln and Franklin Roosevelt exercised during dire emergencies.

Since Franklin Roosevelt's first term, academics and intellectuals, with a few prominent exceptions, have denigrated the Congress and canonized the Presidency. Presidents have followed suit. Roosevelt attempted to purge the Senate of faithless followers in 1938. Truman ran against a "do-nothing, no good" 80th Congress. He attempted to exercise prerogative power by seizing the steel mills during the Korean War but was stopped by the Supreme Court decision he obeyed. Courageously he committed troops to stop an aggressor in Korea but without a declaration of war or a supportive congressional resolution. Two years later it was dubbed "Truman's War" and lost much congressional and public support.

Throughout the nineteenth century, the major political parties strongly opposed the preeminent Presidency, and Congress, except for short periods, dominated the

Government. Even after the strong Presidencies of Theodore Roosevelt and Woodrow Wilson, Congress remained the dominant branch until 1933. In his inaugural address in that year, Franklin Roosevelt called for wartime powers to meet a peacetime crisis:

> I shall ask the Congress for the one remaining instrument to meet the crisis—broad executive power to wage a war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe. [Congress backed his request.]

His actions throughout the 1930s and until Pearl Harbor were opposed by the congressional wing of the Republican party which held to the Whig view of power and opposed the strong Presidency.

But as the Republican party became the Presidential party under Eisenhower, Nixon, Ford, and Reagan, that attitude changed. And the Democrats who strongly supported the delegation of power to Roosevelt, Truman, Kennedy, and Johnson now stress the enumerated powers of article I, in an attempt to balance the powers of the strong President, which they helped to create. The views of both have changed, probably only temporarily and until the political roles are reversed and their candidate is in the White House.

Both parties should ponder the growth of Executive power. Do we want a parliamentary system or a modified parliamentary system? Would it work in a country as large as and as heterogeneous and as diverse as the United States? Should we move to what might be a more efficient government and abandon, in part, the protections provided by the division and diffusion of power which the Founding Fathers provided in an effort to keep the country free?

Let us turn to two of the many areas where there is controversy between the President and Congress—the conflicts over war powers and foreign policy.

War Powers and Foreign Policy

Much of the controversy swirls around the War Powers Resolution and the President's role as Commander in Chief, on the one hand, and the concomitant authority of the President in the remaining areas of foreign policy, on the other. The provisions of the former have yet to be carried out by any President in a dozen or more instances where the provisions of the resolution could or should have been invoked. In the remaining foreign power areas, there is a constant iteration of a part of the wide ranging *dicta* by Justice Sutherland in the *Curtiss-Wright* decision that the President is "... the sole organ of the federal government in the field of international relations." Those who assert the language do so in ever increasing authoritative tones but without mentioning that basically the case was a very narrow one in which President Roosevelt acted under the language of a congressional joint resolution by issuing a proclamation authorized by the resolution, against the sale of arms to those engaged in an armed conflict in Chaco.

Fifteen machine guns were sold by *Curtiss-Wright* to Bolivia and the Court upheld the Government's right, based on the proclamation, to prohibit the sale. The narrowness of the actual case and the additional *dicta* by Justice Sutherland that the power of the President in international relations "... like every other government power, must be exercised in subordination to the applicable provisions of the Constitution" are seldom mentioned.

Conversely, ultimate omnipotence of the President was declared by Lieutenant Colonel North after he was asked by Senator Hatch if he thought Congress had any role to play in foreign policy. Following assertions that the President makes foreign policy he patronizingly agreed, "There is a role [for Congress], and that is the appropriation of money to carry out that policy." But as Edward S. Corwin has written

> The Constitution considered only for its affirmative grants of power capable of affecting the issue, is an *invitation to struggle* for the privilege of directing American foreign policy.

Some of those who argue that the President has largely an exclusive role in international affairs forget that until 7 September 1787, 10 days before the Constitution was endorsed and signed, the treaty-making power read

> The Senate of the United States shall have power to make treaties and to appoint ambassadors, and judges to the Supreme Court.

This was changed to read

> The President shall have power, by and with the advice and consent of the Senate of the United States, to make treaties, provided that two-thirds of the Senate present concur.

This is an extraordinarily difficult number to reach on any controversial treaty.

If one really believes the President is the sole organ of the Federal Government in the field of foreign relations, he or she should tell that to Woodrow Wilson with respect to the Versailles Treaty or to Jimmy Carter with respect to SALT II. Short of a constitutional amendment to repeal the two thirds requirements and other provisions of article I, the President is not the "sole organ," but shares power in the field of international relations.*

The War Powers Resolution

Perhaps the best illustration of the ongoing arguments over the powers of the President and Congress is found in the controversy over the War Powers Resolution.

Many of the objections to the War Powers Resolution put forward by its opponents often appear exaggerated or the result of a hasty reading of the document. The arguments that it provides that troops must be withdrawn even if Congress takes no action at all in 60 days, that it delegates congressional powers to the President, that it

*See appendix detailing constitutional powers affecting national security.

would inhibit action in the case of a missile attack, that the *Chadha* decision on the legislative veto has made it unconstitutional are all highly debatable interpretations of its terms.

Let us examine its content and note the care by which such problems are met by a good faith reading of the text of the resolution. This can best be done by a series of questions and answers.

Q. Why is it the War Powers Resolution, not the War Powers Act?

A. It was a joint resolution of Congress which both the House and Senate passed and, under article I, section 3, the "presentment clause," was sent to the President (Nixon) for his signature or veto, as in the case of a bill (article I, section 2). It was passed over his veto.

It was a resolution because it not only affected the President and the executive branch but it also provided for congressional action and priority procedures with respect to a Presidential report or congressional concurrent resolution, and amended the rules of the House and Senate to carry them out.

If the legislation had affected only the executive branch it would have been an act under article I, section 2, of the "presentment clause."

Q. Does it delegate power to the President or denigrate the power of the President, or does it increase or decrease the power of Congress?

A. According to the resolution, "no." It specifically states

> Nothing in this joint resolution (1) is intended to alter the Constitutional authority of the Congress or of the President, or the provisions of existing treaties; or (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

Q. What are its "consulting" requirements?

A. It says

> Section 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Q. Has a President ever "consulted" Congress before introducing forces into hostilities?

A. According to Congress, "No." He has "informed" Congress, as in the Grenada incident and before the firing on the oil platform in the Persian Gulf, but no President has asked for the judgment of the congressional leaders *before* he made his decision.

Q. Did the President have to consult in the *Mayaguez* incident?

A. President Ford has criticized the resolution on grounds that at the time of the *Mayaguez* incident, three or four key congressional leaders were in Greece, the same number in China, and it was difficult to find others who were scattered in their states and districts. The resolution, however, anticipated such circumstances and requires the President to consult with Congress only "in every possible instance." Obviously it was not possible to consult in this instance.

Q. Does the President have to "consult" if he has 30 minutes or less to answer a Russian missile threat, for example?

A. The combination of the language that he shall consult "in every possible instance" and that his powers extend to the exercise of his authority as Commander in Chief to introduce armed forces into hostilities without congressional action under the resolution in a "... national emergency created by attack upon the United

States, its territories or possessions, or its armed forces" (section 2(c)(3)) clearly indicate no requirement to consult in such circumstances.

Under the same section it is clear American armed forces have the right to return fire under rules of engagement if fired upon.

Q. When must he "report" to Congress?

A. In three circumstances under section 4, within 48 hours—

> Section 4(a). In the absence of a declaration of war, in any case in which United Armed Forces are introduced—
>
> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.

Q. What is the report to set forth?

A. (A) the circumstances necessitating the introduction of United States armed forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement.

Q. Is he required to make further reports?

A. If forces are introduced under section 4(a)(1) he is required to report periodically but at least every six months. He is not required to report further under the other two circumstances, but Congress can ask for additional information.

Q. What action does Congress take?

A. First, the 60-day clock runs and Congress acts only when the President reports under section 4(a)(1), i.e., when forces are introduced into hostilities or imminent involvement in hostilities is clearly indicated by the

circumstances. There is no requirement to act under section 4(a)(2) and (3). Second, the President shall terminate any use of the armed forces unless Congress has acted in 60 days to (1) declare war; (2) enact a specific authorization for such use as it has done in the past over Formosa in 1955, in the Mid-East in 1957, Cuba in 1962, the Gulf of Tonkin in 1964, Santo Domingo in 1965, and more recently in Lebanon in 1983 (the latter was not the result of the President invoking the War Powers Resolution by a report under section 4(a)(1)); (3) extend the 60 days; or (4) Congress is physically unable to meet as a result of an armed attack upon the United States.

Q. What if troops are under fire when termination is called for at the end of 60 days?

A. The President has an additional 30 days to withdraw, or 90 days in all.

Q. Can Congress order them out earlier?

A. Yes, if in the absence of a declaration of war or specific statutory authorization the Congress so directs a President by a "*concurrent* resolution."

Q. What is a concurrent resolution?

A. It is a resolution passed by majority vote of both the House and the Senate. It is *not* signed by the President and therefore not subject to a veto.

Q. Why did Congress provide for a concurrent rather than a joint resolution as a means of directing the President to remove troops from hostilities?

A. Congress reasoned that as a declaration of war requires only a majority vote by both Houses of Congress, it should not be required to provide a two-thirds vote to override a Presidential veto of a joint resolution to stop a war. The five wars declared in American history were done by acts of Congress and joint resolutions requiring the President's signature. No President has vetoed a declaration of war.

Congress also reasoned that a President would comply with a resolution passed by a majority of both houses

of Congress. Public opinion would clearly be so opposed to the President's action as to make it almost impossible for him to successfully carry out his actions.

Q. Would troops have to be removed if there were *no* action by Congress in 60 days, as many prominent political and academic people have charged?

A. Both section 6 and section 7 of the resolution detail priority procedures Congress must follow in the case of a joint resolution or bill, on the one hand, or a concurrent resolution, on the other.

These require action, set detailed timetables, prevent filibusters and delay, and lead to action.

Only if there were a negative action defeating a declaration of war, a resolution supporting the President's actions, or an extension of the 60 days, could it be claimed that Congress failed to act. And in those circumstances one would have to say that a defeat of any or all of these was action, not "no" action.

It is a questionable reading of the statute to assert that it provides for removal of armed forces if "no" action is taken, for "no" action seems improbable or impossible under the clear reading of the resolution. It requires the Congress to take the following steps:

—The Foreign Affairs and Foreign Relations Committees must report to the House and Senate a bill or resolution not later than 24 days before the end of the 60 days period.
—The bill or resolution immediately becomes the pending business.
—It must be voted on within three calendar days unless otherwise determined by a yea or nay vote. There is no way to do so without a recorded vote.
—The resolution of one House must become the pending business of the other House at least 14 days before the 60 days expire.
—It must be voted on within three days after it has been reported.

—If there is a disagreement between the two Houses, they are required to go to conference and the bill or resolution must be acted on by both Houses before the 60 days period expires.

Every possible step is provided in the resolution to ensure action.

Q. What if in spite of all these requirements, priorities, and safeguards Congress does nothing? Would the President have to withdraw the troops?

A. In these circumstances, the moral authority of Congress would be severely dissipated. As Louis Fisher has written in *Constitutional Conflicts Between Congress and the President*

> Congress may stand against the President or stand behind him, but it should not stand aside as it did year after year during the Viet Nam War, looking the other way and occasionally complaining about executive usurpation.

The President's authority to refuse to withdraw armed forces from hostilities or imminent danger of hostilities, on grounds that Congress *had failed to carry out* its responsibilities and legal requirements under its own resolution, would be enhanced.

If Congress fails to grant the President authority to stay, by a declaration of war or joint resolution in support of his actions or by an extension of time, or if it fails to pass a concurrent resolution ordering removal, or if it has not voted down one or several of its options, hence giving a clear indication of its views, it has essentially acquiesced in the President's actions. The congressional lack of action would be viewed as pusillanimous and would undermine its authority. But should a President continue if a majority of the Congress fails to support him?

Most of those who continue to criticize the War Powers Resolution on grounds that troops would have to be removed if there were no action by the Congress have erected a number of straw men. The requirements for congressional action, which the resolution details, are designed to cover virtually every circumstance or contingency although it may lack immaculate perfection.

Many of the opponents of the resolution often appear either not to have read it or do not understand it or do not want to understand it. One cannot read the debates over its passage and fail to understand that almost every criticism heard now was raised at the time it was passed and was met by clear language in the text.

The War Powers Resolution is neither wrong nor ridiculous because its opponents have attributed to it defects it does not contain. There is at the same time a strong *ex cathedra* movement to declare it unconstitutional. Such assertions have been heard from former Secretaries of State and Defense, from Attorneys General, and from law school professors, among others. But it is for the Supreme Court, and not for a formidable body of critics, to determine that question.

However, odds are very much against the Supreme Court accepting a case on the War Powers Resolution. When one reviews the Court's determination to avoid judgment throughout the Vietnam war on the constitutionality of various acts of the Government in conscripting citizens to fight in it and other measures, it is unlikely the Court will intervene in a controversy between the other two branches of Government over the War Powers Resolution. Essentially it has said if Congress is unwilling to exercise its formidable powers, especially those of the purse, against the President's action, it should not expect the Court to intervene.

Even if the Court did intervene, there is no certainty it would pronounce the resolution unconstitutional. This is true notwithstanding that its opponents have assured us of the certainty of the Court's action based on their reading of the *Chadha* case involving the legislative veto.

As the constitutional scholar and the country's most knowledgeable expert on the legislative veto, Louis Fisher of the Congressional Research Service of the Library of Congress has written in a statement to the author

> With respect to the legislative veto in the War Powers Resolution, I think a good case can be made that it survives *Chadha* ... the legislative veto was the way Congress

controlled powers delegated to the executive agencies. Nothing was delegated in the War Powers Resolution. It was a pact between two branches. Tenuous, perhaps, but a pact nonetheless. It was not a case where Congress said to the President (as with the legislative veto), here is some of our power, subject to the conditions we attach. Thus I think the legislative veto in the War Powers Resolution can be distinguished from other legislative vetoes.

Until the Court does pronounce on its constitutionality the President—every President—and his officers, "Shall take care that the laws are faithfully executed" and are obligated to carry out the War Powers Resolution in good faith, which is not to say that there are not areas in the resolution about which people of good faith disagree.

Summary

The President and Congress share the war-making powers, foreign policy and treaty-making powers, and the power to nominate and confirm certain officials, among many others.

The struggle over how much authority each should have began in the Constitutional Convention and continues today. In the nineteenth century, Congress was the dominant branch as the language of the Constitution and the intent of the Founding Fathers clearly set forth. In the twentieth century, especially since 1933, power has shifted to the President. This has happened by the delegation of power from Congress, especially over the budget, through experience and practice, because of wartime emergencies, and for other reasons.

In 1973 and 1974 particularly, Congress, through the War Powers Resolution and the 1974 Budget Act, attempted to regain some of its lost powers. In the case of the Budget Act, the law of unanticipated consequences was at work and an act designed by Congress to discipline itself and to regain power from the President has, ironically, enhanced the power of the President and allowed him to discipline the Congress.

In the case of War Powers Resolution, every President since its passage has either disregarded it or flaunted his opposition to it.

When the President sends the military into hostilities, he should make every effort to do so with the support of the Congress and the people. He needs their backing, especially if he expects to sustain his action over any long period of time. He needs to have Congress and the people with him on the takeoff so they are accountable with him for the forced landing.

Further, it is within the first 60 days of an action that the President is most likely to receive support for his action. Some, such as Senator Thomas Eagleton, who originally supported the resolution, ended up voting against it on grounds that Congress sanctioned Presidential war-making powers he did not have. Eagleton felt that it gave the President unlimited power to make war for 60 to 90 days. Perhaps he had in mind the words of Madison himself who, writing as Helvidius in *The Gazette of the United States*, answered Hamilton, as Pacificus, as follows:

> In no part of the Constitution is more wisdom to be found than in the clause which confides the question of war and peace to the legislature and not to the executive department ...
>
> Those who are to conduct a war (the executive as the commander in chief) cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.

The debate over the War Powers Resolution, which has taken place since 1973, has largely involved legalism, predictions of unconstitutionality, and arguments favoring the move towards a parliamentary system, a plebiscitary Presidency, or a unitary state.

It would be a mistake to shift the war-making power from a shared power between Congress and the

President to a unitary power of the President alone. It would not only be a mistake but could harm the national security of the country. Both the President and the country would benefit if the requirements for consultation, reporting, and concurrent action by the Congress were carried out.

THE POWER OF THE PURSE

By ROBERT F. TURNER
University of Virginia

The President ... will be able to manage the business of intelligence in such manner as prudence may suggest.
—John Jay

IT HAS OFTEN BEEN SAID THAT THE UNITED STATES IS "A nation of laws, not of men." There is thus a sad irony in the fact that we entered the bicentennial celebration of our Constitution in the midst of controversy over allegations that certain executive branch national security initiatives have been unlawful. Lengthy joint congressional hearings have captured the attention of television viewers, and millions of dollars have been spent funding investigative efforts involving scores of attorneys and hundreds of support personnel. Whatever the ultimate conclusions, one thing seems clear—the legislative-executive relationship in national security affairs has changed dramatically in recent years.

That the relationship has changed, and that this change has set the stage for an alarming confrontation between the political branches of our Government, are points that we might all agree upon. But it is important to understand what the critical changes have been—and to reassess the conventional wisdom on where the "law-breaking" has actually occurred.

This paper has been published also in *The Atlantic Community Quarterly*. Copyright 1987, printed by permission of the author.

What changes have brought about the current controversy? Is it the fact that the President approved the rewarding of foreign hostage-takers? Hardly, since that precedent dates back to the Presidency of George Washington. Consider this excerpt from the writings of Washington's Secretary of State:

> April the 9th, 1792. The President had wished to redeem our captives at Algiers, and to make peace with them on paying an annual tribute. The Senate were willing to approve this, but unwilling to have the lower House applied to previously to furnish the money: they wished the President to take the money from the Treasury, or open a loan for it. They thought.... that if the particular sum was voted by the Representatives, it would not be a secret. The President had no confidence in the secrecy of the Senate, and did not choose to take money from the Treasury or to borrow.[1]

Is the cause of the recent controversy the fact that the executive branch provided funding and other assistance for a major paramilitary covert operation against a foreign country while concealing details from Congress? That precedent, too, dates back to the days of our Founding Fathers. In 1804, when Thomas Jefferson was President and James Madison his Secretary of State, the Cabinet approved—without Congress being informed—the raising, funding, and training of an army of more than 2,000 Greek and Arab mercenaries in an effort to pressure the Pasha of Tripoli to cease his aggression against American merchant ships and release Americans being held hostage, or to overthrow his government and replace it with one more favorably disposed to the United States.[2] A critical element of this operation involved the sending of the US Naval officer to Alexandria, Egypt, on a secret mission to persuade the exiled brother of the Pasha to lead the expedition. The mercenary army landed in Tripoli and succeeded in capturing the town of Derne, which quickly led to peace talks and a treaty the following June. In return for withdrawing its forces and support for the mercenary army, the United States received trade privileges and all American prisoners were

released. Although the covert paramilitary operation exceeded its approved budget by more than 50 percent, it achieved its objective. When the operation was ultimately made public, the key American agent involved returned as a hero and was awarded a gold medal by Congress. No one in Congress complained about the operation having been concealed from the legislative branch or challenged the President's authority to act without informing Congress.[3]

It is my contention that the factual details of the Iran-contra controversy are not the primary cause of the current controversy. Far more important is the legal environment in which the activities occurred. To a degree unprecedented in our history, Congress has sought in the post-Vietnam era to micromanage the business of foreign and national security policy by statutory enactment. To illustrate the magnitude of this legislative effort, between 1964 and 1984—a period comprising one tenth of the life of our Constitution—the congressional publication *Legislation on Foreign Relations* increased from one 659-page volume to three volumes of more than 1,000 pages *each*. In the past decade, the looseleaf *Guide to Law of the Central Intelligence Agency* has similarly expanded from one to five volumes.

Which Branch is "Breaking the Law?"

Let me return again to the question of which branch is "breaking the law?" This question may seem confusing to some: how can Congress "break the law?" After all, everyone knows that Congress *makes* the "law." Under our Constitution, however, statutes enacted by Congress are only one source of the law—along with the Constitution and treaties—and the only statutes which constitute the "supreme law of the land" are those "made in pursuance" of the Constitution.[4] The powers of Congress are for the most part set forth in article I of the Constitution, section 1, of which begins: "All legislative powers *herein granted* shall be vested in a Congress of the United

States...." Thus, for Congress to act lawfully it must find authority either specifically expressed in the Constitution or reasonably implied from that instrument.

The President's Special Role in National Security Affairs

Historically the President has been recognized to have a preeminent position in the field of foreign and military affairs. The authors of the Constitution were greatly influenced by the separation of powers writings of Locke, Montesquieu, and Blackstone—each of whom vested responsibility for external affairs in the Executive.[5] In vesting "the executive power"[6] in the President they conveyed this authority, subject only to certain carefully designed checks placed in the hands of the Senate and Congress. The proper relationship was summarized by Thomas Jefferson in 1790 in these words:

> The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly....
>
> The Senate is not supposed by the constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them....[7]

Three years later, in his first *Pacificus* letter Jefferson's chief rival, Alexander Hamilton, took a similar position:

> The general doctrine of our Constitution ... is that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument....
>
> It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.
>
> While, therefore, the Legislature can alone declare war, can alone actually transfer the nation from a state of

> peace to a state of hostility, it belongs to the "executive power" to do whatever else the law of nations ... enjoin in the intercourse of the United States with foreign Powers.[8]

The preeminent role of the President in the field of foreign and national security affairs was apparent in the actions and declarations of the early Congresses. For example, although the Secretary of the Treasury was required to make frequent reports to Congress, the statute passed by the First Congress to establish the Department of Foreign Affairs (later State Department) provided in contrast that "the Secretary ... shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."[9] This distinction between the national security departments and other agencies of Government was noted by Professor Westel Willoughby in his classic treatise *Principles of the Constitutional Law of the United States:*

> The acts of Congress establishing the Department of Foreign Affairs (State) and of War, did indeed recognize in the President a general power of control, but the first of these departments, it is to be observed, is concerned chiefly with political matters, and the second has to deal with the armed forces which by the Constitution are expressly placed under the control of the President as Commander-in-Chief. The act establishing the Treasury Department simply provided that the Secretary should perform those duties which he should be directed to perform, and the language of the act, as well as the debates in Congress at the time of its enactment, show that it was intended that this direction should come from Congress. Furthermore, the Secretary is to make his annual reports not to the President, but to Congress.[10]

To select just one further example, when the Senate established its first standing Committee on Foreign Relations in 1816, one of its first reports stated

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest

> prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.[11]

The independence of Presidential national security powers from indirect legislative control through powers granted to the Congress has been recognized by the courts on several occasions. For example, the relationship between the power of Congress to raise and support armies on the one hand, and the President's role as Commander in Chief on the other, was discussed by Chief Justice Chase in *Ex parte Milligan* in 1866 in these terms:

> Congress has the power not only to raise support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief.... [N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the People, whose will is expressed in the fundamental law.[12]

Similarly, in the 1897 case of *Swaim v. United States*, the US Court of Claims stated

> Congress may increase the Army, or reduce the Army, or abolish it altogether, but so long as we have a military force Congress cannot take away from the President the Supreme Command.... Congress cannot in the disguise of "Rules for the Government" of the Army impair the authority of the President as Commander in Chief.[13]

Seeking New Authority for Congressional Control

The legislative efforts to seize greater control over national security affairs have not gone unchallenged by either the Executive or the academic community. The 1973 War Powers Resolution,[14] for example, was vetoed by President Nixon on constitutional grounds before being passed by two-thirds of both houses. A portion of it has already been struck down by implication by the Supreme Court in its landmark 1983 decision of *I.N.S. v. Chadha*.[15] Indeed, it is worth noting that—in an act of alarming civil disobedience to the rule of law—Congress has thus far not only failed to repeal the unconstitutional provisions of this or more than 100 other laws vitiated by this Supreme Court decision but has in fact enacted more than 100 legislative vetoes into law subsequent to the *Chadha* decision. Other portions of the War Powers Resolution are also, almost certainly, unconstitutional, although that discussion is beyond the scope of this paper.[16]

However, there is a growing belief that Congress may permissibly exercise control over Presidential authority that can not be controlled directly through the indirect means of conditional appropriations. One version of the argument appeared in a letter to the *New York Times* from Professor Alfred P. Rubin of the Fletcher School of Law and Diplomacy at Tufts University:

> Lest there be misunderstanding, my published position since 1973 has been that the War Powers Resolution is inconsistent with the fundamental distribution of authority contained in our Constitution. But the problems I see could be easily solved if Congress shifted the basis for its oversight from the irrelevant "war declaring" power to the obvious appropriations power, if Congress really wished to control Presidential adventures.[17]

The reality is that many of the efforts by Congress to control national security policy have relied upon article I, section 9, clause 6, of the Constitution, which provides in relevant part: "No money shall be drawn from the treasury, but in consequence of appropriations made by

law. . . ." This is an important constitutional provision, and substantial check against the Executive. But, like all other provisions of the Constitution, this clause must be understood in context and must not be so interpreted as to vitiate other provisions of the document.

The "power of the purse" is a legitimate check vested in the Congress against many actions favored by the Executive. Certainly in the domestic sphere, by refusing to appropriate funds or by placing detailed conditions on how appropriated funds may be spent, Congress may leave the President little or no discretion in administering national programs. But, as already noted, in the national security sphere the Constitution vests a considerable amount of discretion in the office of the President. This discretion—being entrusted by the people through the Constitution to the Chief Executive—is beyond the control of Congress. To argue that Congress may destroy this discretion, or vest its exercise in itself or in any other place, through its exclusive "power of the purse" is to undermine the fundamental doctrine of separation of powers and to authorize the Congress to seize all governmental authority into its own hands. Such a constitutional interpretation would secure for us the "tyranny of the legislatures" which Mr. Jefferson so passionately warned against in 1789.[18]

Let me stress that it is not my position that the power of the purse provides no additional controls for Congress over matters related to national security. Congress was given this power largely for the purpose of deciding upon the allocation of national resources, and many decisions having national security implications—such as general foreign assistance programs—are so closely tied to the question of resource allocation that Congress may properly exercise considerable control should it so wish.[19] But there are other areas of presidential national security responsibility—such as those concerning the recognition of foreign governments, the negotiation of international agreements, the command of military forces, and the gathering of intelligence information—which the

Founding Fathers clearly intended to vest exclusively in the President; for Congress to seek to seize control of these powers through conditional appropriations is a dangerous challenge to our constitutional system of government. By way of illustration, I would argue that it is unlawful (i.e., unconstitutional) for Congress:

> —to attach conditions to an appropriations measure directing that the American Embassy in Israel be moved from Tel Aviv to Jerusalem;
> —to place conditions denying the use of funds for the salaries of Executive branch officials who engage in specified negotiations with a foreign government or who refuse to seek certain terms in negotiations;
> —to include a provision in the Defense Appropriations Bill denying funds of the deployment of military forces to one or more specified countries (or requiring that troops be based at a particular location);
> —to require as a condition of appropriations that certain types of intelligence-gathering information be disclosed to Congress or a committee thereof.

A full discussion of each of these points is beyond the scope of this paper, but the general argument is a simple one. Each of these areas was intended by the Founding Fathers to be vested exclusively in the President, and Congress is given no constitutional power to regulate them.[20] For Congress to attempt to control them indirectly through its control over the nation's purse strings constitutes an illegal abuse of power.

Indirect Controls and the Supreme Court

The Supreme Court has noted on many occasions "the great principle" that "what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result."[21] A classic example of the application of this doctrine was presented in the 1872 case of *United States v. Klein*.[22] At issue was whether Congress could use its acknowledged exclusive control over the jurisdiction of inferior Federal courts—in this case the Court of

Claims—to deny effect to a Presidential pardon (a power vested in the President by the same sentence that makes him "Commander in Chief"). Angry at President Johnson's granting of a full and unconditional pardon—restoring certain property rights—to former Southern sympathizers, the Congress responded by attaching a rider to an appropriations act denying the Court of Claims jurisdiction over suits brought by recipients of pardons who wished to recover their property. The provision further enjoined the Supreme Court from considering appeals of such cases.

Unable to enforce his Presidential pardon, Klein brought suit before the Supreme Court. The Court acknowledged that Congress had "complete control over the organization and existence" of the Court of Claims, and that it "may confer or withhold the right of appeal from its decisions." However, the Court reasoned

> [T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court has adjudged them to have.... It provides that, whenever it shall appear that any judgment of the court of claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction.[23]

The Court concluded that this was "not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" but instead that Congress had "inadvertently passed the limit which separates the legislative from the judicial power." Continuing, the Court concluded

> The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.
>
> It is the intention of the Constitution that each of the great coordinate departments of the government—the legislative, the executive, and the judicial—shall be, in its sphere, independent of the others. To the Executive

alone is intrusted the power of pardon; and it is granted without limit.... Now it is clear that the legislature cannot change the effect of such a pardon any more than the Executive can change a law. Yet this is attempted by the provision under consideration.[24]

Congress has frequently sought to use its broad taxing powers to achieve indirectly results which it is denied by more direct means, and when that has occurred the Supreme Court has not hesitated to strike down the offending statutes. Two brief excerpts provide a flavor for the underlying principle:

—In *Pollock v. Farmer's Loan & Trust Co.*, the Court said

If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution.... [C]onstitutional provisions cannot be thus evaded. It is the substance and not the form which controls as has indeed been established by repeated decisions of this court. Thus in *Brown v. Maryland* ... it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void.... So in *Dobbins v. Erie County Comrs.*,... it was decided that the income from an official position could not be taxed if the office itself was exempt.

In *Almy v. California*, ... it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented.... "The substance, and not the shadow, determines the validity of the exercise of the power." *Postal Telegraph Co. v. Adams*.[25]

—More recently, in the 1963 case of *United States v. Butler*, the Court relied upon one of the most famous of all of its prior cases in reasoning:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal ... to say that such an act was not the law of the land." *McCulloch v. Maryland*.... The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to

to obtain funds to fight the war, but in signing the law he expressed the view that the provision was unconstitutional. It was challenged in the courts, and Congress responded by sending its counsel to argue "that this involved simply an exercise of congressional powers over appropriations, which are plenary and not subject to judicial control."[32] The Court emphatically rejected this argument, reasoning

> We ... cannot conclude, as [Counsel for Congress] urges, that [the section] is a mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justifiable question in the courts, but is merely a political issue over which Congress had final say.... We hold that [the section] falls precisely within the category of congressional actions which the Constitution barred by providing that "No Bill of Attainder or ex post facto Law shall be passed."[33]

By vesting in Congress only those "legislative powers herein granted," and vesting in the President "the executive power," it would seem equally clear that Congress could not use its power of the purse to indirectly exercise or circumscribe Executive national security powers.

In addition to these decisions of the Supreme Court, over the years various Attorneys General have issued opinions asserting the unconstitutionality of various statutory initiatives aimed at using the "power of the purse" to infringe upon the independent powers of the President.[34]

A Tradition of Legislative Deference

The question of using conditional appropriations to instruct or control the actions of the President or his executive branch subordinates in the national security field is not a new one. What is different about the post-Vietnam era is that Congress has departed from the traditional legislative viewpoint that such constraints are improper. A thorough discussion of this practice is beyond the scope of this short paper,[35] but a few examples should suffice to illustrate the traditional viewpoint.

Although the Constitution requires that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time,"[36] when the First Congress on July 1, 1790, appropriated funds for foreign affairs the statute provided in part:

> [T]he President shall account *specifically* for all such expenditures of the said money *as in his judgment may be made public*, and also for the *amount* of such expenditures *as he may think it advisable not to specify*, and cause a regular statement and account thereof to be laid before Congress annually....[37]

Thomas Jefferson is viewed by many as having been the champion of strong legislative authority and in principle an opponent of overly broad appropriations acts, yet Jefferson recognized that the field of foreign affairs was unique. In a February 19, 1804, letter to Secretary of the Treasury Albert Gallatin, President Jefferson wrote

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations.... The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties.... Under ... two standing provisions there is annually a sum appropriated for the expenses of intercourse with foreign nations. The *purposes* of the appropriation being expressed by the *law*, in terms as general as the duties are by the *Constitution*, the application of the money is left as much to the discretion of the Executive, as the performance of the duties.... From the origin of the present government to this day, the construction of the laws, and the practice under them, has been to consider the whole fund ... as under the discretion of the President as to the persons he should commission to serve the United States in foreign parts, and all the expenses incident to the business in which they may be employed.... [I]t has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.[38]

One of the great early debates on the question of conditional appropriations for foreign affairs occurred in

April, 1826, when Representative Louis McLane, of Delaware, proposed attaching an amendment to a bill appropriating funds for a diplomatic mission to Panama, expressing the "opinion" of the House that the US delegates "ought not be authorized to discuss ... any proposition of alliance ... between this country and any of the South American Governments...."[39] Representative Daniel Webster—one of the foremost constitutional scholars of his era—spoke against this proposal on constitutional grounds:

> There is no doubt that we have the power, if we see fit to exercise it, to break up the mission, by withholding the salaries; we have power also to break up the Court, by withholding the salaries of the Judges, or to break up the office of the President, by withholding the salary provided for it by law. All these things, it is true, we have the power to do, since we hold the keys of the Treasury. But, then can we rightfully exercise this power? ... For myself, I feel bound not to step out of my own sphere, and neither to exercise nor control any authority, of which the Constitution has intended to lodge the free and unconstrained exercise in other hands....
>
> This measure comes from the Executive, and it is an appropriate exercise of Executive power. How is it, then, that we are to consider it as entirely an open question for us, as if it were a legislative measure originating with ourselves? ... The process of the gentleman's argument appears to me as singular as its conclusion. He founds himself on the legal maxim, that he who has the power to give, may annex whatever condition or qualifications to the gift he chooses. This maxim, sir, would be applicable to the present case, if we were the sovereign of the country; if all power were in our hands; if the public money were entirely our own; if our appropriation of it were mere grace and favor; and if there were no restraints upon us, but our own sovereign will and pleasure. But the argument totally forgets that we are ourselves but public agents....
>
> The President is not our agent, but, like ourselves, the agent of the People. They have trusted to his hands the proper duties of his office; and we are not to take those duties out of his hands, from any opinion of our own that we should execute them better ourselves.[40]

From time to time over the next 150 years efforts were made in Congress to use conditional appropriations to control the President's national security powers, and such efforts were typically defeated by voice vote following statements by more senior legislators recognizing the constitutional defects of the approach.[11] Consider, for example, this 1928 exchange between newly elected Senator John Blaine of Wisconsin and Senate Foreign Relations Committee Chairman William Borah:

> MR. BORAH. Mr. President, the Constitution of the United States has delegated certain powers to the President; it has delegated certain powers to Congress and certain powers to the judiciary. Congress can not exercise judicial powers or take them away from the courts. Congress can not exercise executive power specifically granted or take it away from the President. The President's powers are defined by the Constitution. Whatever power belongs to the President by virtue of constitutional provisions, Congress can not take away from him. In other words, Congress can not take away from the President the power to command the Army and the Navy of the United States.... Those are powers delegated to the President by the Constitution of the United States, and the Congress is bound by the terms of the Constitution.
>
> MR. BLAINE. Another question. All that the Senator has said in a general way is sound constitutional law, but before there can be any action on the part of any Government unit requiring the expenditure of funds that are in the Public Treasury, or that may be placed in the Public Treasury, Congress must first act and make an appropriation for every essential purpose. That money so appropriated can be used for no other purpose than that designated by Congress, and there is no power that can coerce Congress into making an appropriation. Therefore, Congress's power over matters respecting the making of war unlawfully, beyond the power of the President, outside of the Constitution or within the Constitution, or conducting hostilities in the nature of the war during peace time, can be limited and regulated under the power of Congress to appropriate money.
>
> MR. BORAH. Of course, I do not disagree with the proposition that if Congress does not create an army, or does not provide for an army, or create a navy, the President can not exercise his control or command over an

> army or navy which does not exist. But once an army is created, once a navy is in existence, the right to command belongs to the President, and the Congress can not take the power away from him.[12]

Modern Scholarly Opinion

Until quite recently there appeared to be a widespread consensus among constitutional scholars that Congress could not use conditional appropriations to regulate the President's conduct of foreign and national security affairs. In the interest of brevity, I shall mention but two examples.

Professor Quincy Wright was one of the preeminent American scholars in the field for nearly four decades. In addition to serving as President of the American Political Science Association and the International Political Science Association, Professor Wright served as President of the American Society of International Law. In his 1922 landmark study, *The Control of American Foreign Relations*, he explained

> In foreign relations, however, the President exercises discretion, both as to the means and to the ends of policy. He exercises a discretion, very little limited by directory laws, in the method of carrying out foreign policy. He has moved the navy and the marines at will all over the world.... Though Congress has legislated on broad lines for the conduct of these services it has descended to much less detail than in the case of services operative in the territory of the United States. In foreign affairs the President, also, has a constitutional discretion as the representative organ and as commander-in-chief which cannot be taken away by Congress and because of the extraterritorial character of most of his action, his subordinates are not generally subject to judicial control.
>
> But more than this he has initiated foreign policies, even those leading to treaties and those leading to war, and has generally actively pushed these policies when the cooperation of other organs of government is necessary for their carrying out. Though Congress may by resolution suggest policies, its resolutions are not mandatory and the President has on occasion ignored them.

> Ultimately, however, his power is limited by the possibility of a veto upon matured policies, by the Senate in the case of treaties, by Congress in the case of war.[13]

A more recent study by Columbia Law Professor Louis Henkin, *Foreign Affairs and the Constitution*, provides this analysis:

> *"Unconstitutional conditions"*
>
> Congress has attempted to influence the conduct of the President, and of other governments, by imposing "conditions," especially on spending and appropriations....
>
> The constitutional lawyer would distinguish between different appropriations and between different conditions. If Congress cannot properly withhold appropriations for the President's activities, it ought not be able to impose conditions on such appropriations. Even when Congress is free not to appropriate, it ought not be able to regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly. So, should Congress provide that appropriated funds shall not be used to pay the salaries of State Department officials who promote a particular policy or treaty, the President would no doubt feel free to disregard the limitation, as he has "riders" purporting to instruct delegations to international conferences.[14]

Conclusion

The architects of the Constitution understood that legislative bodies lack the unity of design, speed, and secrecy essential for the effective conduct of foreign affairs,[15] and they intentionally gave the President the bulk of the responsibility for these activities. As Professor Quincy Wright observed, "[W]hen the constitutional convention gave 'executive power' to the President, the foreign relations power was the essential element in the grant...."[16] To protect against Executive abuse, checks in the form of a Senate veto over proposed treaties and a legislative veto over declarations of war were incorporated in the design. As exceptions to the general grant of Executive power to the President, these legislative powers were to be construed narrowly.[17] If the feuding between

Congress and the President over the conduct of national security policy has served no other useful purpose, it has at least affirmed the great wisdom of the Founding Fathers in their realization that legislative bodies lack the necessary attributes for successful foreign intercourse.

There is a growing realization in this country that Congress is breaking the law by some of its enactments attempting to control the President's conduct in the realm of foreign and military affairs. The post-Vietnam explosion of legislative restrictions in this critical field is unprecedented and is contrary both to the intentions of the Founding Fathers and to nearly two centuries of constitutional practice. Even when the Supreme Court has struck down as unconstitutional fundamental provisions of many of these laws—as it did by implication in the 1983 case of *INS v. Chadha*[48]—Congress continues to leave the statutes on the books in flagrant disrespect of the oath taken by each of its members to support the Constitution.[49]

With the recognition that Congress may not directly exercise national security powers vested by the Constitution in the President, a search has begun for indirect means of accomplishing this same end. The favored contemporary approach is by conditional appropriations. To the extent that Congress seeks through the use of conditional appropriations to exercise indirectly powers vested by the Constitution in the President, or to deny the President his constitutional discretion *vis-à-vis* such powers, its conduct is a threat to our constitutional system of separation of powers.

Congressional fears that the President's independent national security powers are subject to abuse are perhaps understandable, although in my view charges of Executive abuse in recent decades are generally overstated.[50] But the Constitution includes protections against abuses of Executive power. The President may not, for example, initiate an offensive "war" without formal approval of both Houses of Congress. If he violates this prohibition, he is subject to impeachment.[51] The Constitution makes

no provision for anticipatory breach of its fundamental provisions by the Congress on the grounds that the President's constitutional powers might ultimately be abused.

Consider, for a moment, the frightening consequences of upholding the alleged power of Congress to use conditional appropriations to seize control over the President's Commander in Chief or other Executive constitutional powers. Are there any limits too such a power? If Congress were permitted to tie any conditions it wished to impose on the Executive to approval of the President's salary or the basic appropriations for key Government departments, would there remain any separation between the two political branches? Might not appropriations for the Department of Defense be conditioned upon the President's agreement to polish the shoes of the Speaker of the House upon demand or to nominate a designated friend of the Speaker to serve as Secretary of Defense?

Fortunately, this claimed new authority in the "power of the purse" is unlikely to withstand judicial scrutiny. The courts must recognize that if the Congress is permitted to seize control over the independent constitutional powers of the executive branch, the independence of the judicial branch will soon disappear as well. After all, the judiciary needs appropriated funds to pay salaries and rent, to hire marshals and publish opinions, and for numerous other purposes. If it recognizes in Congress a plenary power to use conditional appropriations to determine where troops shall be stationed or what terms shall be sought in negotiations, where lies its defense when Congress decides to destroy the power of judicial review by conditioning judicial appropriations upon certain statutes not being held unconstitutional? Put simply—under a constitutional regime of three separate, coequal, and independent branches—the courts must realize that they can not permit an assault on the independent powers of the Executive without leaving their own constitutional authority in jeopardy. Thus, the dangerous and historically discredited theory that Congress may control the President's independent national security

powers by the use of conditional appropriations is highly unlikely to pass muster in the courts.

Notes

1. Andrew A. Lipscomb & Albert E. Bergh, eds., *The Writings of Thomas Jefferson* (Washington, DC: Thomas Jefferson Memorial Association, 1904) vol. I, pp. 305-6.

2. For a discussion of this operation, see Abraham D. Sofaer, *War, Foreign Affairs, and Constitutional Power: The Origins* (Cambridge, Mass.: Ballinger Publishing Co., 1976), vol. I, pp. 218-21 (1976).

3. Ibid., pp. 221, 441 n. 257.

4. US, Constitution, art. VI.

5. Locke technically termed the power to defend the commonwealth from foreign injury the "Federative Power" and noted that it was not truly "executive" since it did not involve "execution of the laws." But he argued that it required for its success the same characteristics of unity of design, speed, and secrecy possessed by the Executive, and said the two powers "are always almost united." John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Co., Inc. 1980), p. 77, section 147. In discussing separation of powers in *Federalist*, No. 47, James Madison referred to "the celebrated Montesquieu" as "the oracle who is always consulted and cited on this subject...." Jacob E. Cooke (ed.), *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961) p. 324. Professor Quincy Wright notes: "This need of concentration of power for the successful conduct of foreign affairs was dwelt upon in the works of John Locke, Montesquieu, and Blackstone, the political Bibles of the constitutional fathers." Quincy Wright, *The Control of American Foreign Relations* (New York: MacMillan Co., 1922), p. 363. See also Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, New York: Foundation Press, Inc., 1972), p. 43, who writes: "The executive power ... was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone."

6. US, Constitution, art. II, sec. 1.

7. *The Writings of Thomas Jefferson*, vol. 3, pp. 16, 17.

8. Reprinted in William M. Goldsmith (ed.), *The Growth of Presidential Power: A Documented History* (New York: Chelsea House, 1974), vol. 1, p. 398 (1974). Although, writing as *Helvidius* (p. 405), Madison challenged Hamilton's thesis that the power to declare neutrality was inherently "executive," he earlier recognized the general principle that "the executive power" was vested in the President by article II, section 1, of the Constitution, and that "exceptions" to this power vested in Congress should be construed "strictly." *Debates and Proceedings in the Congress of the United States*, vol. 1, pp. 496-97 (1789).

9. *US Statutes at Large*, vol. 1, pp. 28-29 (1789).

10. Westel W. Willoughby, *Principles of the Constitutional Law of the United States* (New York: Baker, Voorhist Co., 2d ed. 1934), p. 620.

11. Quoted in Edward S. Corwin, *The President: Office and Powers 1787-1957* (New York: New York University Press, 4th rev. ed. 1957), p. 441, n.114.

12. 71 US (4 Wall.) 139 (1866).

13. 28 Ct. Cl. 173, *aff'd*, 165 U.S. 553 (1897).

14. Public Law 93-148 *US Statutes at Large*, vol. 87, p. 555, 50 U.S.C., sections 1541-48.

15. 462 U.S. 919 (1983).

16. See, e.g., Robert F. Turner, *The War Powers Resolution: Its Implementation in Theory and Practice* (Philadelphia: Foreign Policy Research Institute, 1983).

17. Rubin, "Up the Gulf Without a Paddle of International Law," *New York Times*, August 30, 1987, p. E 26.

18. "The tyranny of the legislatures is the most formidable dread at present, and will be for many years." Letter to James Madison in *The Writings of Thomas Jefferson*, vol. 7, p. 312. Earlier, in his *Notes on the State of Virginia*, Jefferson complained of the all-powerful Virginia legislature: "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others [vol. 2, p. 163, emphasis in original]." James Madison wrote: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist*, No. 47, p. 324.

19. I am here addressing the legal authority for such control, not the political wisdom. The record of legislative efforts to second-guess the Executive in the foreign assistance realm in recent decades has not been an inspiring one.

20. Congress and the Senate certainly have important powers related to these issues—such as a Senate veto over a signed treaty, and a congressional veto over a proposal to initiate a "war"—but as exceptions to the general grant of Executive power these powers should be construed narrowly. See above, notes 7-8 and accompanying text. These powers certainly do not include the authority to participate in

negotiations (or to dictate in advance the terms thereof), to determine the capital city of a foreign State, or to control the deployment of military forces. In discussing the wisdom of the constitutional fathers in permitting the President to conduct negotiations in secret by requiring ultimate Senate consent before a treaty could be ratified, John Jay explained that under the proposed Constitution "the president ... will be able to manage the business of intelligence in such manner as prudence may suggest." *The Federalist*, No. 64, p. 435.

21. Fairfax v. United States, 181 U.S. at 283, 294 (1901). See also, Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).

22. 80 U.S. (13 Wall.) 128 (1872).

23. Ibid., p. 145.

24. Ibid., pp. 147-48.

25. 157 U.S. 429, at 581-82 (1895). See also, McGray v. United States, 195 U.S. 27 (1904) "If a case was presented where ... it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights, which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, then it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred [p. 64]."

26. 298 U.S. 1, at 68-69 (1963).

27. 271 U.S. 583, at 599 (1926).

28. 393 U.S. 23, at 29 (1968).

29. Hart v. United States, 16 Ct. Cl. 459, at 484 (1880). In affirming this case, the Supreme Court emphasized that "we do not depart, in the least, from what was held, on the subject of pardons, in the cases of ... United States v. Klein," and noted that "no pardon could have had the effect to authorize the payment out of a general appropriation...." Hart v. United States, 118 U.S. 62, at 67 (1886).

30. Ibid., p. 483.

31. 328 U.S. 303 (1946).

32. Ibid., pp. 306-07.

33. Ibid., pp. 313, 315.

34. See, e.g., *Opinions of the Attorney Generals of the United States*, vol. 9, pp. 462, 467-68 (1860); Ibid., vol. 27, p. 259 (1909); ibid., vol. 40, p. 507 (1960); ibid., vol. 41, pp. 230, 509 (1955).

35. A more detailed discussion is contained in the writer's forthcoming study, *Congress, the Constitution, and Foreign Affairs*, scheduled for publication by the University Press of Virginia.

36. U.S. Constitution, art. I, sec. 9.

37. *US Statutes at Large*, vol. 1, p. 129 (1790). (Emphasis added.)

38. *The Writings of Thomas Jefferson*, vol. 11, pp. 5, 9, 10 (Emphasis in original).

39. *Congressional Debates*, 19th Cong., 1st sess., vol. 2, p. 2009 (1826).

40. Ibid., pp. 2255-59.

41. See, e.g., the examples set forth in Corwin, *The President: Office and Powers 1787-1957*, pp. 401-4 n. 64.

42. *Congressional Record*, 70th Cong., 1st sess., vol. 69, p. 6759 (1928).

43. Wright, *The Control of American Foreign Relations*, p. 149. Elsewhere in the same volume Wright states: "Declarations of foreign policy may be made by Congress in the form of joint resolutions, but such resolutions are not binding on the President. They merely indicate a sentiment which he is free to follow or ignore. Yet they are often couched in mandatory terms and in defense of his independence the President has frequently vetoed them." Ibid., p. 278. "Though congressional resolutions on concrete incidents are encroachments upon the power of the Executive Department and are of no legal effect, yet they may be of value as an index of national sentiment." Ibid., p. 281.

44. Henkin, *Foreign Affairs and the Constitution*, p. 113.

45. See, e.g., *The Federalist*, No. 64, pp. 432-35 (J. Jay) and above, text at note 11.

46. Wright, *The Control of American Foreign Relations*, p. 147.

47. See above, notes 7-8 and accompanying text.

48. See above, note 15.

49. US. Constitution, art. VI.

50. For a discussion of the charge that Congress was improperly excluded from the decision to commit combat forces to Indochina, See Turner, *The War Powers Resolution*, pp. 2-10.

51. US. Constitution, art. I, sections 2 and 3.

THE CONSTITUTION, CONGRESSIONAL GOVERNMENT, AND THE IMPERIAL REPUBLIC

By ROBERT S. WOOD
Naval War College

One of the great advantages of the three separate branches of government is that it is difficult to corrupt all three at the same time.

—Sam Ervin

WE SEE OURSELVES AS A NATION OF DIVERSITY AND PRAGmatism, but our diversity and pragmatism have always revolved around a continuing constitutional discussion, an assertion and reassertion of what Madison called "plain and general truths."

At the origins of our country, the founders felt constrained to establish a republic responsive to the realities of a relatively constant human nature and of shifting economic, political, and social conditions. They felt that only an understanding of the dimensions and interrelationships of human nature and human conditions could provide a solid foundation for a free and stable government.

Political authority in this view, arises not from the struggle among interests and classes but from opinion. As Madison argued, opinion is "the source of both the power and stability of government as well as the security for individual rights."[1] Man's imperfect reason, self-love, and disparate talents combined with varied conditions of life produce a diversity of opinion. Such a natural diversity

can only be eliminated if free institutions were suppressed. Hence, Madison's insistence that "opinions are not the (proper) objects of legislation." Yet, despite the natural diversity, the founders believed that free and stable institutions required a consensus which would undergird the Constitution.

The great republican experiment must be, thus, founded and sustained not by appeals to particular interests or threats of force, but by a national town meeting, a community seminar that would provide first principles or "fixed opinions" strong enough to transcend and contain particular interests and classes. In the view of the founders, this seminar would focus on the interrelationship between the forms of government and the scope of government.

For a nation that prides itself on its pragmatism and anti-intellectualism, our politics have been remarkably philosophical in character. Claims of class, interest, and party have never provided a firm title to political authority. Only if such claims are transmuted into constitutional coinage—are attached to the "great seminar" in political philosophy initiated by the founders—can they acquire legitimacy in the land.

The Supreme Court has always been central to this process, but at times of great political, economic, and social transition, the *political leadership* begins to deal in this coinage. Abraham Lincoln, Theodore Roosevelt, Woodrow Wilson, Franklin D. Roosevelt—all took up the central theme in political philosophy and constitutional doctrine. The subject matter is again the forms and scope of government, and the object of the discussion is public opinion—that final arbiter of political authority. The grammar of the discussion is budgets, military modernization, and foreign policy, but the theme concerns the nature of government in America.

The Founding Formula

Born of the Enlightenment, the new American Republic was influenced by the natural rights tradition.

In Thomas Jefferson's eloquent words, "governments are instituted not to confer but to secure rights that belong to men simply by virtue of their humanity." These rights include the security of one's life and property and rather extensive parameters within which individuals and groups may pursue their private visions of happiness. It was assumed that religious feeling, moral education, the juxtaposition of interests, and the constraining influence of local sentiment and institutions would shape a civic consciousness robust enough to allow the widest exercise of individual liberty while maintaining public institutions sufficiently stable and competent to secure union, justice, defense from attack and the general welfare.

The scope of government was neither to define nor to impose a model for a morally complete or "saved" individual but, more modestly, to provide a *free, orderly* environment within which individuals might realize their interests and pursue their principles. The founders designed forms of government to create and maintain such a free environment—and to contain the natural excesses that might arise from such a milieu.

The pattern is established: a democratic polity in which the dangers that an overbearing majority might pose to the rights of others are mitigated by the tragmenting but intermixing of powers across the institutions of government. It was the embodiment of these ideas in the Constitution that constitutes the American version of limited government. The critical question for any inquiry into national security policy is whether or not this constitutional formula was to be applied to the conduct of foreign affairs as it was to domestic policy making. The answer at the founding was clearly "*yes*," but the historical evolution of the Republic has in practice made it an open question.

The Constitution, Foreign Policy, and Executive Prerogative

Article I, section 8, of the Constitution explicitly grants to Congress the power to "provide for the

common Defense;" "regulate Commerce with foreign Nations;" "define and punish Piracies and Felonies committed on the high seas and Offenses against the Law of Nations;" "declare War, grant letters of marque and reprisal, and make rules concerning captures on land and water;" "raise and support Armies;" "provide and maintain a Navy;" "make Rules for Government and Regulation of the land and naval forces;" "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions;" "provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the service of the United States;" and to "make all laws which shall be necessary for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

If article I, section 8, grants specific authority, article II, section 2, states Presidential authority in terms not of function but of office: "The President shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States." Partisans of Presidential power assert that authority in *external* affairs, particularly war powers, not specifically delegated elsewhere, inhere in the Executive Office of the President. On the other hand, advocates of congressional authority argue that the specific grants of authority in article I, especially the power "to declare war," provide Congress with an amplitude of power, including the right to authorize war. Indeed, in 1793 none other than James Madison defined *external* power, and most specifically war-making, as being not executive but legislative in character: "The power to declare war ... including the power of judging the causes of war, is fully and exclusively vested in the Legislature, that the executive has no right in any case, to decide the question whether there is, or is not cause for declaring war."[2]

In the record of the debates of the Constitutional Convention, it becomes clear that the framers did not treat the exercise of *external* power as something apart from the constitutional formula. There was an attempt to organize a unified foreign policy represented by the executive branch, but in *coordination* with Congress. As in other areas, both the separation of powers and checks and balances were to govern the conduct of foreign affairs.

Much of the debate concerning the relative authority of the President and Congress centered on the power to declare war. The original draft empowered Congress "to make war," but it was felt that this wording was too restrictive on the Executive in case of sudden attacks. Moreover, it was generally accepted that the normal conduct of war once initiated was an Executive function.[3] Nonetheless, there appeared to be agreement that the determination of war was normally a legislative function. Hence, Raoul Berger concluded that the Constitution "conferred virtually all of war making powers upon Congress, leaving the President only the power 'to repel sudden attack' on the United States."[4] It would seem that Madison's assessment of the respective powers of President and Congress was accurate.

John Locke, another great contributor to the notion of limited government and one who exerted important influence on the thinking of the founders, did not place foreign policy power under the same limitations as other exercises of government authority. Locke, unlike the founders, defined institutional limitations almost exclusively in terms of restrictions upon Executive power—but, at the same time, he did not extend these restrictions to the Executive's exercise of power in *external* affairs. Indeed, he referred to this latter assertion of executive authority by a special term, "federative" power.[5]

In the United Kingdom, this power was designated as "the King's prerogative" under which Blackstone's *Commentaries* listed "The entire range of powers relating

to war and peace, to diplomacy and the making of treaties, and to military command"[6] Arthur Bestor describes Blackstone's position:

> At the outset, Blackstone recognizes two different sources for the authority of the chief executive in the domain of foreign relations. Vis-à-vis other nations, the King "is the delegate or representative of his people." Therefore, the handling of all aspects of the "nation's intercourse with foreign nations" is an executive prerogative. The King is also "the generalissimo, or the first in military command, within the Kingdom," and this fact places in executive hands the control of a variety of matters relating to military security.... One of the variety of matters relating to military security is the "prerogatives to make treaties, leagues, and alliances with foreign states and princes." The next is "the sole prerogative of making war and peace.[7]

Those partisans of Executive power in foreign affairs in the continuing debate over Presidential prerogatives tend to emphasize both the general perspective of Locke and Blackstone and the near absolute character of the separation of powers doctrine, at least in the area of *external* policy.

Even Alexander Hamilton, who argued in the *Federalist* papers, No. 69, that the President's powers under the Constitution were far inferior to those of the King of England, later asserted that authority over foreign relations was *per se* an Executive function and that Congress was limited only to such authority as was specifically enumerated in the Constitution.[8]

Under this line of reasoning, foreign policy is "Executive" in nature and the presumption of authority should always be on the side of the President. As Justice Sutherland argued in *United States v. Curtiss-Wright Export Corporation* (1936): "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or to listen as a representative of the nation."[9] And Senator J. William Fulbright supported in 1961 a near total Presidential authority in the use of force: "We have hobbled the

President by too niggardly a grant of power.... As Commander in Chief of the armed forces, the President has full responsibility, which cannot be shared, for military decisions in a world in which the difference between safety and cataclysm can be a matter of hours or even minutes."[10]

If the President possesses extensive prerogatives in the area of national security, then so too, it is asserted, do many departments and subordinates acting under his general direction. An invocation of national security is thus a political question, most subject to judicial interpretation or congressional resolution under constitutional norms.

This range of privileged Presidential power is also justified on the general grounds of the separation of powers doctrine—that is, Presidential discretion in the area of his Executive functions is complete, subject only to the grossest of legislative discipline, i.e., cutting off appropriations or impeachment. In effect, carrying out an Executive function, as *long as it is not criminal*, is privileged.

Many have argued that the demands of external action and the shape of historical events have—and should—favor such Presidential authority. Eugene Rostow criticizes those scholars who seek to delimit foreign policy authority on the basis of the Constitutional Convention. He argues that they, too readily

> dismiss the fact that the men who made the Constitution had quite another view of its imperatives when they became Presidents, Senators, Congressmen, and Secretaries of State. The words and conduct of the Founding Fathers in office hardly support the simplified and unworldly models we are asked to accept as embodiments of the only True Faith.[11]

Foreign Policy and the Evolution of Presidential and Congressional Powers

The founders severely qualified any notion of Presidential prerogative and rejected what would effectively

be an executive reserved sector in foreign policy and national security. There were three basic reasons underlying this decision:

(1) Such unfettered authority in the area of foreign policy and national security could be extended into the domestic sphere;

(2) There was no threat to American security so massive or so immediate as to require such a surrender of power to the executive; and

(3) The founders asserted the primacy of domestic concerns which, in practice, implied the primacy of Congress in all political arrangements.

The aim of our Constitution, therefore, was to provide to the individual, whether alone or joined with others, the widest possible sphere within which personal liberties and private interests and values might be pursued. Our institutions were arranged and endowed with power to resist encroachments on the Republic and its liberties both from external foe and internal ambitions. Those conditions which favored this constitutional balance included the unity of the States composing the Republic, an integrated and self-sufficient economy, the absences of a great power threat on our borders, and the protection afforded by the oceans. The joining of wise institutions and favorable geographics and material conditions provided an unprecedented opportunity to construct a government "of the people, by the people, and for the people."

Moreover, there was widespread concern among the founders that federal power be limited in its ability to engage the United States in foreign quarrels or to pursue ambitions that would alter the central character of American society. If it is inexact to portray US foreign policy in our earlier years as isolationist, it is correct to see that policy as governed by at least norms of nonalignment and by limitations on what we might characterize as power projection.

Both the demands of expanding to our continental dimensions and the desire to retain the spirit of free and limited government in our western territories forbade extensive "foreign" (i.e., transoceanic) adventures. These views undergird the suspicions of the Jeffersonians and the Jacksonians about a National Bank, the credit potential of which could finance foreign engagements and develop a vast naval capability that could support these engagements. However, the growth of our nation eventually forced the world upon us.

The evolution of powers within and between our political institutions, the growth and diversification of our populations, the complexity of our economy, the growing egalitarian spirit, and the pressures of the external world also contributed to the strengthening of our *federal* institutions as we became more internationally oriented. As the European capitals became the animating force of their nations, so the central power in Washington, DC, became the engine of our Nation. Social and economic, as well as political, agendas were determined and fixed in the District of Columbia in ways that the founders probably feared—and every crisis at last came to center, if not initiate, in our nation's capital.

This migration of power has favored the Executive—for the articulation of policy, the administration of programs, the celebration of the nation, and the defense of the Republic, are prone to Executive dominance. The 1921 Budget and Accounting Act, the creation of the Executive Office of the President in 1939, the 1946 Full Employment Acts, the 1947 National Security Act—all are signposts on the road to Presidential power.

The founding intent of the Republic, the bias of the Constitution, and the counterbalancing of men and institutions, as the founders themselves understood, have sometimes braked this thrust toward Executive dominance and the Imperial Republic. The results, however, have not always been productive of coherent policy.

Congress is ever sensitive to its authority under the Constitution and its powers in relation to the President.

This is as true in foreign as in domestic policy. At the same time, members of Congress are always aware of the social profile, values, and interests of their constituents. It is thus important that Congress be internally organized so as to unify these constituency interests into a coherent position and to insulate to some degree the members from their constituent pressures. Alas, changes in Congress since at least the mid-seventies have tended in the opposite direction to the point where that body is extraordinarily representative in its component parts and remarkably irresponsible in its collective role.

The proliferation of committees and subcommittees and their staffs, institutionalized special committees, and informal groups, together with the erosion of leadership influence and seniority, have made it difficult for a President of whatever party or ideological predisposition to forge binding agreements with the Congress—save assent to do nothing or to continue automatic programs that protect the position or interests of one segment of the electorate or another.

If all of this is coupled with the access points of lobbying groups, the intrusiveness of television and the use for election and reelection of that same medium with money provided by lobbyists and PACs, then the potential for gridlock is evident. Moreover, the increasing demands and desire for Congress to play its equal role in the Government have led to a tremendous growth in staff support. If information is power, then Congress has improved its capabilities vis-à-vis the White House. The consequence for the polity, however, has been guerrilla, and at times frontal, warfare between these two branches of the Government. If the answer to the question "who's in charge" has always been difficult to discern, it is even more obscure today.

It is important to qualify this "pointing with alarm." In the organization of the Executive Office of the President, the White House has improved its leadership capabilities through various liaison offices for Congress, the lobbyists, and the media, as well as with the

traditional links with other levels of Government and the President's party. At times, when the planets are properly aligned so that the President's own electoral position, the skill of his staff, the state of the economy, the mood of the nation, and a sense of crisis are all properly configured, the President can move his programs by moving Congress.

Nevertheless, the propensity of Congress to maintain its position vis-à-vis the Executive is revealed by Congress in blocking Presidential initiatives and by imposing legislative restrictions. Such combativeness normally occurs after a major crisis in which the Executive has asserted broad powers (i.e., depression, war, rebellion) or after a particularly inept exercise of Executive power. Congressional dominance after the Mexican War, the Civil War, and World War I might be examples. A similar period of executive-legislative antagonism and congressional assertion began to develop after World War II but was mitigated by the exigences of the global power vacuum at the end of World War II and the onset of the Cold War. The divisive and unsuccessful Vietnam war and the erosion of the US economic position in the world finally led to a bitter struggle between the two branches of the Government—a conflict that was at least as much institutional as partisan.

This struggle occurred at a time when vast social and ethnic changes were taking place—and in an environment where economic growth was slowing or inflation was increasing or both. The political atmosphere became combative. Moreover, many of the issues associated with the Vietnam war, such as civil rights, favored renewed attention to the domestic agenda. National events, along with the apparent intractability of external issues, impelled Congress toward greater involvement in all policy spheres.

Arguments that the distinction between external and internal politics cannot be clearly drawn in the contemporary world are beside the point. Whatever the interdependence of issues among different polities, they will be

perceived from a national perspective and will have impacts on individuals and constituencies. The ancient bias of the Founding Fathers toward congressional power again favors congressional government, however well organized or able Congress is to play that role.

Constitutional Balance and the Shape of Foreign Policy

The evidence for what the Executive would see as the intrusion of the legislative branch into both the definition and conduct of foreign policy has been visible since the late sixties: The Senate-adopted "National Commitments Resolution" in June 1969, the 1971 amendment to the Special Foreign Assistance Act withholding funds for US operations in Cambodia, the congressional restriction in August 1973 on future US force deployments in Indo-China, the Clark Amendment restricting assistance to the rebels in Angola, the restrictions imposed on US policy vis-à-vis Greece, Turkey, Israel, and the Arab states, strictures on US trade with the Soviets, the establishment of Senate and House Select Committees on Intelligence, the 1972 War Powers Resolution, and so forth. All of these legislative engagements came under the Nixon and Ford administrations at the end of an unpopular war but the trend continued—most dramatically under Carter with the failure to ratify the SALT II accord and under Reagan with the restrictions on sales of arms or aid to the Saudis, the Jordanians, and the Contras.

Although it appeared in the early Reagan years that Presidential preeminence in foreign policy was being reestablished, the unease over the administration's policies in Lebanon, in Central America, and on SDI and arms control was translated into active hostility by the Iran-contra affair. The evidence that the administration had sought to circumvent congressional strictures and had misled the various committees charged with foreign policy and intelligence oversight, coupled with what appeared to be the disarray in the administration itself, triggered once again much of the animus associated with the Vietnam era.

Congress manifested in a host of ways its hostility to Reagan's policies and its intent on shaping US foreign and national security policy. The Senate attached an amendment to the defense spending bill for the 1988 fiscal year requiring the President to abide by the limits on nuclear weapons set in the unratified 1979 Strategic Arms Limitations Treaty and barred the President from conducting space tests on the "Star Wars" missile defense system. Side-stepping a direct confrontation over the constitutionality of the application of the War Powers Resolution to the Persian Gulf operation, Senators Byrd and Warner introduced a resolution as a kind of moral equivalent providing that *60 days from the passage of the resolution, the Senate would consider what to do about the Persian Gulf*. By arguing that the administration has no national strategy and no coherent program for joint planning and operations, the Congress sought to impose both strategy and jointness with a vision which, if anything, was less coherent than that expressed by the administration. In less august but no less symbolically charged areas, the Congress also intervened in areas of military decorum and discipline by allowing Service members to wear visible religious articles while in uniform.

Whatever the substantive difference between Watergate and the Iran-contra affair and whatever the ultimate definition of both issues in terms of criminal law, both confrontations were shaped by the institutional struggle over Presidential prerogatives in foreign policy and the constitutional balance. Both affairs provided the occasion for inquiry into the authority of the respective branches and the constitutional provisions governing their relations.

The conflict between President and Congress in the area of external affairs has been in the public perception as unedifying as the conflict over approaches to the national debt. But one thing should be clear: the country cannot be governed in foreign policy without the concurrence of the President and Congress. Under current conditions this is going to require substantial changes

institutionally, procedurally—and intellectually—in both branches—and possibly in the very character of US foreign policy.

It connotes too much to describe the American role in foreign affairs since World War II as that of an "Imperial Republic," as the French scholar, Raymond Aron, did. He was referring to the decisive character of American power in shaping a global politic and the supreme power of its decision in affecting the geostrategic and economic character of its external alignments. Whether this description was entirely accurate or remains accurate today, there is no question that the United States has played a great power role far beyond what many of the founders expected or wished.

In other terms, we might characterize the US role as that of a "regulatory state," the classic position of a great power seeking to construct and maintain a central geostrategic balance while advancing its interests in a world divided among many states and political movements. Coalition building, aid and trade programs, arms sales, periodic intervention or punitive strikes, counterbalancing regional adversaries—these policies of containment and power management, while relatively new to the United States, are not without antecedents.

It is the complexity of such a policy within an international system characterized by anarchy, rival ambitions, terrorism, wars, and contending values that led commentators such as Locke and Blackstone to assert the necessity of Executive prerogative. However, the flexibility and apparently contradictory lines of Presidential policy in such an environment are antithetical to the legislative character that tends toward public discourse and legal formulations. For this reason the more extensive and multi-dimensional the American role in external affairs, the more likely that the President, whatever point of view he adopted before assuming the Executive Office, will be tempted to circumvent, if not subvert, congressional directions and restrictions. Given the nature of our constitutional order and the animating spirit of our Republic,

Presidents should at least contain these sentiments. On the other hand, congressmen must understand that the manner in which they do business tends to drive Presidents to bypass them, less because of personal ambition or criminal intent than because of the frustration in designing a policy both coherent and responsive to an incoherent world.

There are a number of things that can be done to ease, if not resolve, the tension. On the executive side, the President must understand that the same degree of White House lobbying that goes into pushing his domestic agenda must be exerted in foreign policy. The forging and reforging of coalitions, trade-offs, and bargaining are as applicable to the making of foreign policy as of domestic policy. Most recent Presidents have acted in this way, but this activity seems never as sharply understood, perhaps because of the inaccurate refrain that politics stops at the water's edge. There *should* be some solidity in our foreign policy orientation, but given the shattering of the national security consensus during the Vietnam period, this solidity will only emerge and be sustained within a vigorous political process. Moreover, persistent deceit vis-à-vis Congress by the members of the executive branch will not only abort Executive initiatives but will delay indefinitely the reestablishment of "plain and general truths" about the Republic's role in world affairs.

On the other hand, the ways of Congress are not particularly conducive to either advice or consent. If a change of attitude and leadership style is required of the Executive, Congress may need more substantial structural alteration. A dramatic reduction and consolidation of committees and subcommittees, an increase in the authority of the congressional leadership, a willingness to approve multiyear budgets and to refrain from roller-coaster financing of the national defense and external programs, an acceptance of the role of a deliberative body providing general guidance rather than an alternative executive branch—these are but a few of the directions in which Congress may desirably move.

Even more controversial, Congress must find mechanisms to influence the Executive short of legislative enactments. The struggle over policy can best be defined in terms of wise or stupid, effective or ineffective, but US interests are hardly advanced when the issues are stated in the language of criminal law. It must be admitted, however, that, if Congress often seems to drive the President to bypass it, Presidential circumvention forces the Congress toward more extensive, legislated restrictions. If this vicious cycle is not broken, both the honor and effectiveness of US foreign policy will suffer.

Any advice on improving Presidential-Congressional cooperation will never hit the mark if there is a fundamental divergence among our political leaders on the meaning of American power and its role in the world. The consequence of such a division will be either persistent attempts by one branch to pursue policies apart from a consensus or the inability to ever pursue any policy at all.

Notes

1. Cited in Robert Morgan, *American Political Science Review*, vol. 75 (1981), p. 615. See James Madison, *Writings*, vol. VI, pp. 70, 85.

2. *The Writings of James Madison*, vol. VI, ed. G. Hunt (1906), p. 174.

3. *The Records of the Federal Convention*, vol. II, ed. M. Farrard (rev. ed., 1937), p. 319.

4. R. Berger, "War Making by the President," *University of Pennsylvania Law Review* 121 (1972), p. 82.

5. John Locke, "On Civil Government," in *The English Philosophers to Mill*, ed. Edwin A. Burtt (1939), pp. 462-63.

6. Cited in Arthur Bestor, "Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined," *Seton Hall Law Review* V (Spring 1974), p. 536.

7. Ibid, pp. 532-33.

8. *The Works of Alexander Hamilton*, vol. IV, ed. H. Lodge, (1906), pp. 437-44.

9. 299 U.S. (1916), 319.

10. William Fulbright, "American Foreign Policy in the Twentieth Century under an 18th Century Constitution," *Cornell Law Quarterly* 47 (1961), p. 50

11. Eugene Rostow, "Great Cases Make Bad Laws: The War Powers Act," *Texas Law Review* 50 (1972), p. 841.

PART II

THE EVOLUTION OF THE PRESIDENCY

PRESIDENTIAL POWERS AND NATIONAL SECURITY

By LARRY BERMAN
University of California, Davis

Ours is a government of checks and balances, of shared power and responsibility. The Constitution places the President and the Congress in dynamic tension. They both cooperate and compete in the making of national policy. National security is no exception.
—The Tower Commission Report

THE ISSUES EMERGING FROM THE IRAN-CONTRA INQUIRY involved the constitutional framers' views about *human nature*, *governmental power*, and *republicanism*. The constitutional framers of 1787 represented a generation that had suffered the consequences of concentrated power used for tyrannical purposes. Individual liberty could not exist if legislative and Executive powers were united in the same person or governmental body. The new institutional relationships were devised to diffuse tyranny in any form—legislative, judicial, or executive. In *Federalist*, No. 47, James Madison warned that "the accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The constitutional framers sought a balance between grants of governmental power and guarantees of individual liberty. How could they create a government strong enough to govern the new nation but sufficiently restrained not to infringe on individual liberties? How could they devise

mechanisms for legislative or executive initiative in policy and administration while avoiding tyrannical excess?

By separating institutions and requiring key powers to be shared, the constitutional framers decreased the opportunity for power to be used oppressively. This separation allowed the framers of the Constitution to create a government that accomplished the reconciliation of republicanism and liberty. This Madisonian solution involved connecting and blending the branches, giving to each a constitutional control over the others. The blueprint divided federal and state responsibilities as well as executive, legislative, and judicial functions; further divided the Legislature into Senate and House with separate sources of selection; staggered terms in the Senate; and devised an electoral college to choose the President. After separating the branches of government and the sources of selection, the constitutional framers added a series of checks to balance against the potential tyranny of any branch. In their final act of creativity, the constitutional framers required that these separated branches be dependent on one another in the process of formulating majoritarian policies.

The Bicentennial Context

America's constitutional blueprint for a government of balance now has become a distinctly *Presidential government,* sustained by popular expectations that strong Presidential leadership should solve national problems. The framers of the Constitution recognized that future experience would change the power relationships delineated in and among the divisions; however, they intended that power would check power, but the Supreme Court has generally upheld Presidents when they exceeded strict constitutional limits. And Congress, not necessarily the Constitution, helped to make the President primes inter pares.

The irony of the constitutional framers' blueprint rests in the fact that the legislative branch ceded the President broad-based responsibilities and agreed to an

institutionalized Presidency for administering added obligations. Thus, the cumulative effect of Supreme Court and congressional actions has been to create a *dominant* Presidency.

From the constitutional framers' perspective the very notion of Presidential leadership of the political system was anathema to the preservation of liberty and balance between the branches. The framers of the Constitution would be puzzled by the scope and complexity of problems that only the President, in his capacity as "The Government," is expected to solve.

Events surrounding the Iran-contra affair lead us to ask whether our institutional designs inherently foster confrontation. Is our constitutional blueprint adequate for governing? Can we identify institutional modifications to improve government performance?

The framers of the Constitution sought and encouraged dissent between the separated branches. Yet, they could not anticipate that a *divided government* would be characterized by a legislative branch controlled by one party and the executive by another. The 1984 Presidential election epitomized the lack of linkage between the act of voting for President and the formation of a government to carry out that President's program. President Reagan amassed 525 of the 538 electoral votes, but the House remained Democratic, 253-182. Just what type of mandate could Ronald Reagan claim from "the people?" Had the American people intended for Congress to check the foreign policy program of a personally popular President?

Diffusion in policy-making responsibility under separated institutions has led to confusion in voters' minds on whom to hold accountable for governmental deadlock—since neither Congress nor the President constitute "The Government," just part of it.[1] Separated institutions and divided government also confront the exaggerated expectations American citizens hold for their President. Gone are the days when Calvin Coolidge could identify his greatest accomplishment as "minding my own business."

The health of the nation is now seen as best protected in the hands of a strong President, not Congress. A great irony of this country's constitutional heritage has been that successful Presidents crossed constitutional boundaries to expand the power and reach of their office at the expense of Congress and the Supreme Court.

Iran-contra events demonstrated that the environment in which the President operates provides few stable relationships for achieving political success. Witnesses testifying before the congressional committee investigating the Iran-contra activities cited congressional *resurgence* as diluting Executive responsibility in foreign affairs—thereby justifying the *privatization* of foreign policy. They alleged that Cooper-Church (1971), the War Powers Resolution (1973), the Jackson-Vanik amendment (1974), the Clark amendment (1976), the Intelligence Oversight Act (1980) and the Boland amendment(s) constituted congressional usurpation of Executive power.[2]

The continuing tension between superpowers has created a permanent Cold War climate; American interests are generally viewed as best represented by the President. Yet, the gap widens between the President's responsibility and his constitutional capability, between promise and performance. Presidents are driven by an electoral calendar to "get their way." Professor Hugh Heclo has identified this as an "illusion" of Presidential government.[3] Only the President can assume responsibility for making government work, yet, for all of his political responsibility, the President is still in a vulnerable constitutional position.

Iran-Contra Arguments

The Iran-contra hearings raised familiar questions on how democracies in "a dangerous world" are to carry out foreign policy. We do not want a king, nor do we want 535 Bismarcks. The hearings revealed that the traditional modes of checks and balances were circumvented by anonymous members of the "enterprise." Cabinet officers who had been confirmed under checks and balances were not trusted by members of the enterprise.

Instead, a private network of skilled operators set out to redirect American foreign policy on a course which contradicted the laws of the United States. Lieutenant Colonel North told the congressional committee, "I think it is very important for the American people to understand that *this is a dangerous world*, we live at risk and this Nation is *at risk* in a *dangerous world* ..." Richard Secord told the committee, "I mean, this *is a dangerous world* we live in today." Admiral Poindexter insisted, "we live in a *very imperfect world*.... The stakes are simply too high for us not to take actions."

However imperfect and dangerous the world, is it really any more dangerous or unstable than the hostile environment that confronted our 55 constitutional framers in 1787? In *Federalist*, No. 75, the strongest advocate of executive energy, Alexander Hamilton, wrote, "the history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of the magistrate, created and circumstanced, as would be a president of the United States."

James Wilson, generally recognized as the foremost legal scholar at the convention, provided an insightful summary of his view of constitutional allocations: "The power of declaring war, and the other powers naturally connected with it, are vested in Congress. To provide and maintain a navy—to make rules for its government—to grant letters of marque and reprisal—to make rules for their regulation—to provide for organizing ... the militia and for calling forth in the service of the Union—all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress."

Executive Power

Members of Congress often tell a bedtime story about the origins of government to their sleepy-eyed

children. The story goes something like this: Once upon a time there was a powerful king who lived in a forest. But having all of this power bored him and he decided to give some to his followers, who eventually became judges and legislators. But "the indefinite residuum, called 'Executive power,' he kept to himself."[4]

The linkage of Executive power and purpose has not always yielded neat solutions. Virtually every justification for Executive energy in national security involves one's world view and policy preferences. This constitutional "wild card" has allowed the President to go beyond what is narrowly described in the Constitution when conditions call for extraordinary action or when in the President's judgment such action is necessary, although President Nixon boldly went where no predecessor had dared in declaring, "when the President does it, that means it is not illegal."[5]

Thomas Jefferson wrote to John Colvin in 1810 that "a strict observation of the written laws is doubtless one of the higher duties of a good officer, but it is not the highest. The law of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law would be to lose the law itself, with life, liberty, property ... thus, sacrificing *the end to the means.*"[6] This "doctrine of necessity" received its most explicit formulation in a letter from President Lincoln to Albert Hodges:

> I did understand, however, that my oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that Constitution was the organic law. Was it possible to lose the nation, and yet preserve the Constitution? By general law, life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the Constitution, if, to save slavery, or any minor matter, I

should permit the wreck of government, country, and Constitution altogether.[7]

Washington was the first President to claim an inherent Executive power, and his presence at the Constitutional Convention might imply that the framers of the Constitution anticipated the contingencies under which such claims could be made. When war broke out in Europe on April 22, 1793, Washington issued a proclamation declaring the United States neutral in the British-French war. Washington's decision infuriated pro-French Americans, led by Thomas Jefferson and James Madison. On what constitutional grounds did Washington act? Did the neutrality proclamation infringe on the legislature's right to declare war? How could Congress declare a war if neutrality had been prejudged? This question became the focus of an intriguing political exchange between Alexander Hamilton, representing pro-British Americans (using the pseudonym Pacificus), and James Madison (writing under the name Helvidius). Hamilton argued that as holder of an Executive power, the President was justified in issuing the proclamation: "The general doctrine of the constitution then is, that the executive power of the nation is vested in the President: subject only to the exceptions and qualifications, which are expressed in the instrument.... *It is the province and duty of the executive to preserve to the nation the blessings of peace.*"

When Madison, the father of the Constitutional Convention, took up his pen, he argued that only "foreigners and degenerate citizens among us, who hate our Republican government," could believe that an *inherent* Executive power existed. Such a claim, Madison reasoned, was no different from the dreaded royal prerogatives exercised by the King in England. Moreover, Congress and only Congress, by virtue of its constitutional power to declare war, could make foreign policy. The President was to serve as the Executive instrument for Congress' will. The immediate result of the Pacificus-Helvidius exchange was congressional passage of the Neutrality Act, following which Washington admitted he had prejudged the issue.

The claim to *inherent Executive power* is usually based on the President's own judgment of a crisis or emergency. For paranoid Presidents this may cause problems in constitutional balance. Does the President possess an inherent power to break into Daniel Ellsberg's psychiatrist's office because he or his political lieutenants determine that national security is involved? Does the President have an inherent power to place phone taps on administration personnel who are suspected of leaking information to the press? Nixon admitted that even though he could see no military comparison between the Civil War and Vietnam, "this nation was torn apart in an ideological way by the war in Vietnam, as much as the Civil War tore apart the nation when Lincoln was president."

Nixon reasoned that as holder of the Executive power, a President can go beyond his enumerated powers and take whatever steps are necessary to preserve the country's security, even if his actions might be unconstitutional. This reasoning worked for Lincoln during the Civil War but could not pass muster during Watergate. During a televised interview with David Frost, Nixon was asked, "Is there anything in the Constitution or the Bill of Rights that suggests the President is that far of a sovereign, that far above the law?" Nixon responded, "No, there isn't. There's nothing specific that the Constitution contemplates in that respect.... In wartime, a President does have extraordinary powers which would make acts that would otherwise be unlawful, lawful if undertaken for the purpose of preserving the nation and the Constitution...." For Nixon, domestic political dissent was defined as a state of war that justified illegal wiretaps, surveillance, and break-ins.

When Fawn Hall and Oliver North made the same case for the doctrine of necessity, it gave additional meaning to W.I. Thomas' theory, "if men define situations as real they are real in their consequences." Notice that Hall said "sometimes you just have to go *above* the written law." The entire enterprise was an exercise in extra-constitutional activity. Sitting in an NSC or White House

office and serving the President made everything seem right—including shredding documents being sought by the Justice Department. This also created the familiar mea culpa, "our hearts were in the right place—even if laws were broken." After all, hadn't Lincoln and F.D.R. made the same case! True believers in the Reagan White House, mostly military men, claimed that American democracy was wrong on policy grounds. As North observed in his memorable jab at Congress, "it is the Congress which is to blame in the Nicaraguan freedom fighter matter. Plain and simple, you are to blame because of the fickle, vacillating, unpredictable, on-again, off-again policy toward the Nicaraguan democratic resistance—the Contras." The appropriate response was provided by Congressman Lee Hamilton. "A democratic government as I understand it, is not a solution, but a way of seeking solutions. It is not a government devoted to a particular policy objective, but a form of government which specifies the means and methods of achieving objectives.... If we support that process to bring about a desired end—no matter how strongly we may believe in that end—we have weakened our country, not strengthened it."

Privatization of foreign policy undermines democracy and ultimately defeats policy. The Iran-contra inquiry revealed little accountability for covert operations, much deception of Congress and the American people, a disregard for checks and balances as well as the rule of law (however often Congress may have changed that law), a reliance on private citizens to execute secret policy, and White House staffing arrangements that *isolated* the President while *protecting* him with a cloak of deniability. As Secretary Shultz told the congressional committee, "I don't think desirable ends justify means of lying, deceiving, of doing things that are outside our constitutional process."

Witnesses before the congressional inquiry explained that the *ends*—the Reagan doctrine of supporting anti-communist insurgencies in which, by definition, our

national security was involved, justified the *means*—in this case, covert White House operations, lying to Congress, and even withholding information from the President by Admiral Poindexter in order to guarantee the President's deniability.

Who Runs the Ship of State?

The diversion of funds was premised on the belief that the President, not Congress and certainly not the State Department bureaucracy, has responsibility for national security. But the diversion of funds subverted even this premise. Admiral Poindexter's "PROF" note to the NSC staff reported, "the fact remains that the President is ready to confront the Congress on the constitutional question of who controls foreign policy." Indeed, President Reagan should have done just that! For reasons which puzzle his staunchest supporters, the President failed to bring his case to a national debate on how Sandinista rule in Nicaragua posed a serious long-term threat to the security of the United States.[8] The two major parties of this country might have then battled politically about what constitutes and defines national security. Is aid to the contras an act of collective self-defense on the part of the United States and other Central American countries against Nicaraguan aggression, or a violation of Nicaraguan sovereignty? Does Executive energy extend to CIA training, arming, and financing of the contras? Is selling arms to Iran and diverting the profits to the contras in the national interest or even a legitimate Executive activity? Can accommodation on national security interests be forged?

Admiral Poindexter, able to act alone, left Washington with "head held high," saying, "I have done my very best to promote the long-term and security interests of the United States." But doesn't the Congress of the United States have a Constitutional responsibility to participate in defining these security interests without

having its patriotism or motives impugned? Is withholding information from Congress justified within the context of a national interest?

One premise is that congressional reassertion over policy runs contrary to the popular desire for a qualitatively better and safer world. Congress responds, oversees, and checks, but Congress cannot lead nor speak for American interests. But Congress is an integral component of citizenry interests within the democratic process. The demands upon and for governmental action continue to grow and only the President can supply the big picture. The potential for Presidential abuse is always present—no legislation can prevent Presidents from attempting to break the law. But Presidents can go a long way in keeping their aides from adopting the mindset, "this is what the President wants even if he doesn't know it" or "this is what the country needs even if democracy hasn't produced it." This comes to the heart of North's defense—he was "buying time" for his indifferent countrymen.

Most practitioners present today can speak from a more informed perspective on the issue of reforming the process. The Tower Commission concluded that "the primary responsibility for the formulation and implementation of national security policy falls on the President."

There are persuasive arguments for a joint congressional intelligence committee, a special leadership committee, increased oversight on covert activities, reducing the size of the NSC and separating the collection of intelligence from its implementation and evaluation. Moreover, President Reagan has already indicated a willingness to establish improved relations with Congress on covert operations.

The country also needs a little less disdain for its political institutions from those working in the White House. Robert McFarlane's PROF note to Oliver North epitomized this mindset: "Roger, Ollie. Well done—if the world only knew how many times you have kept a semblance of integrity and gumption to US policy, they

would make you Secretary of State. But they can't know and would complain if they did—such is the state of democracy in the late 20th century."

Staffing the Presidency

The Iran-contra affair again disclosed the unanticipated effect of salvation from staff. Who do the "President's men" always seem to get in trouble? President Reagan was a victim of his management style, but I wonder what James Madison might say of an NSC staff, not subject to confirmation, engaging in the activities described by Admiral Poindexter (who later shielded his President from knowledge of those very activities). Presidents need help in managing their helpers while at the same time they must avoid insulating themselves from adviser advocacy. What might our constitutional framers think about a White House chief-of-staff who is not required to face Senate confirmation? According to Admiral Poindexter, "in the very real world, the NSC staff has got to be the catalyst that keeps the process moving forward, keeps the President's decisions moving along, and helps to make sure that they are implemented and that often involves an *operational role* for the NSC staff. Their only loyalty is to the President."

In the White House, *proximity to the President is power.* The natural law of White House gravity eventually finds Cabinet officers operating through special assistants, counselors, or a chief-of-staff. President Reagan's first Secretary of State, Alexander Haig, recalled that during President Reagan's first meeting with his Cabinet, Edwin Meese and James Baker were seated at the Cabinet table and not in the rear chairs traditionally reserved for White House aides. "H.R. Haldeman and John Ehrlichman at the height of their pride," Haig wrote, "would never have dared" sit in these chairs. Edwin Meese, the first White House assistant to hold Cabinet rank, "took the part usually played by the President."[9]

The Brownlow Committee (rather than the National Security Act) emphasized that Presidential assistants

should not be involved in *operational activities* and should receive tasks which could not be constitutionally delegated to Cabinet officers. The Brownlow report displayed keen insight and sensitivity with regard to the potential dangers of installing mere mortals into the White House office. The effectiveness of these Presidential assistants would be directly proportional to their ability to discharge functions with restraint: "They were to remain in the background, make no decisions, issue no orders, make no public statements, and never interpose themselves between Cabinet officers and the President. These assistants were to have no independent power base; instead, Cabinet officers would continue to operate as visible and constitutionally legitimate Presidential linkages with the political system."[10]

In his message accompanying the proposed legislation to implement the Brownlow recommendations, President Roosevelt urged Congress to understand that "what I am placing before you is not the request for more power, but for the tools of management and the authority to distribute the work so that the President can effectively discharge those powers which the Constitution now places upon him." As Secretary Shultz told the congressional committee, "the Secretary should have the President's point of view and make the department respond to that point of view. That's our form of government." But Department Secretaries, unlike Presidential assistants, are bound by the constitutional framers' dictates to be confirmed by the Senate, to testify before congressional committees, and to have those committees approve their departmental budgets. Congress is thus given a chance to check Executive activity. For this reason, Presidents tend to sour on constitutional government.

The National Security and War Powers Irresolution

Coming on the heels of Iran-contra, the current debate on war powers reveals the irreconcilable tension

between the governmental branches. *War power* has traditionally centered on one overriding question: who should have the right to commit American forces to combat, and what constitutional restrictions should such a commitment entail? The invasion of Grenada, deployment of US forces in Lebanon or Bolivia, the US attack on Libya or Persian Gulf policy reveal that unlike the clandestine activities of Iran-contra, the issue of war powers has involved an open assault on Congress. But similar types of questions are involved. Is the President empowered to initiate unannounced Navy flight operations over the Gulf of Sidra, drawing Libyan military fire? Should the President be required to consult with Congress when authorizing freedom of navigation exercises? The argument on *means* is often influenced by the *outcome*. American troops were initially committed to Bolivia without congressional consultation to assist Bolivian police in raiding cocaine plants. What if the troops had come under fire? Americans applauded Ronald Reagan's strike against Qaddafi, brushing aside constitutional questions on inter-branch collaboration. Selling arms to so-called Iranian "moderates" elicited a far more negative response.

The April 1986 air raid against Libya was undertaken *without* prior consultation with Congress. Legislative leaders were not briefed until warplanes had *already* left Britain for Libya. Should the President have consulted with legislative leaders? President Reagan held a clear opinion, saying "I just don't think that a committee of 535 individuals, no matter how well intentioned, can offer what is needed in actions of this kind or where there is a necessity."

Within days of the Libyan air raid a bill was introduced by Republicans in both houses of Congress which would have authorized the President to respond to foreign terrorism *without* prior consultation with Congress. The bill *exempted* the President from the War Powers Resolution (which the administration views as unconstitutional) when responding to terrorist attack with deadly

force. The President would be required to report to Congress within 10 days of any anti-terrorist action—including preemptive strikes or even presumably the assassination of foreign leaders. One of the bill sponsors said that if Colonel Muammar el-Qaddafi "became deceased as the result of our counter-strike, that would have been within the intent of the bill." Authorizing the President to use any means necessary to preempt acts of terrorism against US citizens clearly goes well beyond "mere execution" of laws and presumably should involve prior consultation between the branches.

Libya provided a "best-case" test of Presidential energy. Qaddafi constituted a symbol of international terrorism to most Americans. Far more complex with respect to constitutional distinctions is President Reagan's program of intervening covertly on behalf of "freedom fighters" throughout the world. The question falls squarely on one's faith *in the President's* defining national security interests. In announcing the decision to reflag Kuwaiti oil tankers and provide naval escorts, President Reagan said the actions were "vital to our national security." The President also said "we must maintain an adequate presence to deter and, if necessary, to defend ourselves against any accidental attack. As Commander in Chief, it is my responsibility to make sure that we place forces in the area that are adequate to that purpose.... we are in the Gulf to protect our national interests and, together with our allies, the interests of the entire Western world. Peace is at stake; our national interest is at stake."

Granting every benefit of doubt to the President, wouldn't his hand be strengthened by bringing Congress into a "prior consultation?" Somewhere and somehow the two branches must reach accommodation and bipartisan agreement on what constitutes the national security interests of the United States. Stalemate and deadlock threaten to destroy the ends of government for which the very constitutional framework was devised. The effect of gridlock hurts the public interest and obfuscates political responsibility.

Conclusion

The Constitution did not create a leadership institution but three separate institutions sharing power in an era *without* television, PACS, opinion polls, ticket splitting, political parties, and over 250 million Americans. There are reflexive cries for more accountability through improved congressional oversight, less secrecy by executive branch and White House officials, greater supervision and reporting of covert operations by the President and calls for bipartisan accommodation in foreign policy. "In withholding information from Congress, our government took on the essence of dictatorship, not democracy."[11]

Iran-contra was an assault upon the principles of free government. The most serious policy errors in judgment included ransoming hostages with arms to a country whose victory would imperil regional stability. Congress may be everything its detractors say it is, but the fact remains that Iran-contra is about the *abuse of power* by Presidential lieutenants, not a wishy-washy Congress. A letter from Madison to Thomas Jefferson, who was not at the convention, offers the best available statement of the Founding Fathers' goals:

> The great objects which presented themselves were (1) to unite a proper energy in the Executive and a proper stability in the Legislative departments with the essential characters of Republican Government; (2) to draw a line of demarcation which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them; (3) to provide for the different interests to different parts of the Union; (4) to adjust the clashing pretension of the large and small States. Each of these objects was pregnant with difficulties. The whole of them together formed a task more difficult than can be well conceived by those who were not concerned in the execution of it. Adding to these considerations the natural diversity of human opinions on all new and complicated subjects, it is impossible to consider the degree of concord which ultimately prevailed as less than a miracle.

It is remarkable testimony to the "miracle" of the constitutional framers that 200 years later we are debating their blueprint. In *Federalist*, No. 1, Alexander Hamilton observed that the time had come "to decide the important question whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force." That challenge is the legacy of our constitutional heritage.

Notes

1. See Lloyd Cutler, "To Form a Government," *Foreign Affairs*, Fall 1980. See also James Sundquist, *Constitutional Reform and Effective Government* (Washington, DC: Brookings Institution, 1986), and Larry Berman, *The New American Presidency* (Glenview, Ill.: Scott, Foresman, 1987).

2. Fourteen members of Congress brought suit to challenge the constitutionality of the Boland amendments on grounds that Congress' "micromanagement" of US foreign policy had usurped the President's constitutional powers. See *Congressional Record*, 7 August 1987, p. E3406. (In the US District Court for the District of Columbia, Civil Action No. 87-1414, Gesell, J.)

3. Hugh Heclo, "The Presidential Illusion," in Hugh Heclo and Lester Salamon, eds., *The Illusion of Presidential Government* (Boulder, Colo.: Westview Press, 1981), p. 2.

4. Edward Corwin, *The President: Office and Powers* (New York: New York University Press, 1957), p. 307.

5. See, the *New York Times*, 4 June 1977, where the Nixon-Frost dialogue is transcribed. See also, "Televised Interview with David Frost," 20 May 1977, in Barbara Hinckley, ed., *Problems of the Presidency* (Glenview, Ill: Scott, Foresman, 1985), p. 256.

6. Jefferson to John Colvin, June 29, 1810. In Paul Ford, ed., *The Writings of Thomas Jefferson* (New York: Putnam, 1899), vol. 9, p. 276. Emphasis added.

7. See John Nicolay and John Hay, eds., *The Complete Works of Abraham Lincoln* (New York: Francis Tandy, 1891), vol. 10, pp. 65-68.

8. For the most powerful statement of this perspective, see Douglas Jeffrey, "The Iran-Contra Affair and the Real Crisis of American Government," *Claremont Review of Books*, Spring 1987, pp. 3-8.

9. Alexander Haig, Jr., *Caveat* (New York: Macmillan, 1984), pp. 82-83.

10. See "President's Committee on Administrative Management, Report of the Committee, with Studies of Administrative Management in the Federal Government," (Washington, DC: US Government Printing Office, 1977). See also James Fesler, "The Brownlow Committee Fifty Years Later," *Public Administration Review*, July/August 1987, pp. 291-92.

11. Philip Shenon, "Reagan Backed 'Inverted Values,' Iran Panel Says on Tougher Draft," *New York Times*, November 4, 1987, p. 1.

CAN THE PRESIDENT LEAD?

By GEORGE C. EDWARDS III
Texas A&M University

... the most important single factor in the determination of American foreign policy has been the presidential guidance of it.
—Edward S. Corwin

AS WE BEGIN OUR THIRD CENTURY UNDER THE CONSTITUtion, the President might wish the Founding Fathers had been more generous in their distribution of specific national security powers to the executive branch. In recent years Congress has challenged him on all fronts, including foreign aid, arms sales, the development, procurement, and deployment of weapons systems, the negotiation and interpretation of treaties, compliance with the War Powers Resolution, the selection of diplomats, and the continuation of nuclear testing.

This context for policy-making raises several important questions. First, why does the President have to lead Congress on matters of national security? Second, is he able to exercise effective leadership in order to obtain the congressional support he requires to establish his policies? Finally, should the President get his way in disputes with Congress over national security policy?

The last question is a crucial one, and answering it entails estimates of which branch, the executive or the legislative, is more likely to be "correct" on national security policy. The answers to such a question will vary with the values of the beholder and the specific issue at hand. Moreover, they do not affect our analysis of the first two questions. Thus, I briefly address the first

question and then answer the question of whether the President can lead Congress.

The Necessity for Leadership

The answer to the question of why the President must lead Congress on national security policy is relatively straightforward. The Constitution's peculiar merging of powers between the Executive and the Legislature prevents either from acting unilaterally on most important matters, including those falling under the heading of "national security." Moreover, the differences in the constituencies, internal structures, time perspectives, and decisionmaking procedures of the two branches guarantee that they will often view issues and policy proposals differently.[1]

Thus the American political system requires agreement between the President and Congress in order to make most significant national security policy decisions, and at the same time it engenders conflict between the two branches. The result is often stalemate. In such an environment a President desiring to direct national security policy (and this includes all modern Presidents) is compelled to attempt to lead Congress.

There are, of course, important unresolved questions of constitutional law regarding the relative power of the President and Congress in national security matters. These require careful and lengthy analysis. For our purposes, in general the Constitution established a system of shared, not separate, powers in national security as well as in domestic policy matters. Thus, the President typically requires congressional support or at least acquiescence to carry out national security policy.

This allocation of responsibilities is based upon the constitutional framers' apprehension about the concentration and subsequent potential for abuse of power. The Founding Fathers, for example, divided the powers of supply and command in order to thwart adventurism in national security affairs. Congress can refuse to provide the necessary authorizations and appropriations

for Presidential actions, while the Chief Executive could refuse to act, as in not sending troops into battle at the behest of the Legislature.

In addition to the fact that the President can rarely act alone, there is another fundamental reason why he needs to lead: he is the driving force in national security policy, providing energy and direction. Although Congress has a central constitutional role in making national security policy and although it is well organized to openly deliberate on the discrete components of policy, it is not well designed to take the lead on national security matters. Its role has typically been oversight of the Executive rather than the initiation of policy. In domestic policy Congress frequently originates proposals, but in national security policy, where information is less readily available, where the President has a more prominent role as the sole representative of the country in dealing with other nations and as Commander in Chief of the armed forces (which effectively preclude a wide range of congressional diplomatic and military initiatives), and where the nature of the issues may make the failure to integrate the elements of policy more costly than in domestic policy, Members of Congress typically prefer to encourage, criticize, or support the President rather than to initiate their own national security policy. If leadership occurs, it will usually be centered in the White House.

Can the President Lead?

The President must lead to achieve his goals, but the question is whether or not he can do so. In general, the government of the United States is not a fertile field for the exercise of Presidential leadership. Nowhere is this more clear than in dealing with Congress. Every President bears scars from his battles with the Legislature. Each finds his proposals often fail to pass and that legislators attempt to push him in directions in which he does not wish to go. Yet it is this predicament that makes Presidential leadership all the more necessary.

Extra-constitutional processes such as the preparation of an elaborate legislative program in the White House and the institutionalization of a Presidential lobbying capability have evolved in response to the system's need for centralization. Yet such changes only provide instruments for Presidents to employ as they try to obtain support from the Legislature. They carry no guarantee of success and are no substitute for leadership.

By investigating the President's strategic position in trying to lead Congress on national security policy, we can explore the possibilities of his leadership and obtain a better understanding of his role in the American political system. By asking questions about what it is possible for Presidential leadership of Congress to accomplish, we obtain a better sense of what we can expect from a Chief Executive and what is necessary to produce policy change.

The Context of Leadership

To examine the President's ability to lead Congress on national security matters, we need to understand the context within which attempts at leadership occur. Congress is an institution created to represent the American people, and its members have shown that they are indeed responsive to public opinion. Thus the expectations of the public for Presidential-congressional relations on national security policy will have a major impact on the Chief Executive's ability to lead Congress.

Complicating the President's leadership efforts are the public's expectations that the President be responsive to public opinion and that he be constrained by majority rule in Congress. Polls taken over more than four decades show that the public overwhelmingly desires Congress to have final authority in policy disagreements with the President, and it does not want the President to be able to act against majority opinion.[2]

Even in the area of national security, the public is not necessarily deferential to the President. It had more

confidence in the judgment of Congress than in that of the President on the question of entry into World War II and on reorganization of the Defense Department in the 1950s—even when the latter President was former General of the Army Dwight Eisenhower.[3]

In 1973, 80 percent of the people supported a requirement that the President obtain the approval of Congress before sending American armed forces into action outside the country.[4] With the public's support that year Congress passed the War Powers Resolution over the President's veto. The purpose of this law was to substantially limit the President's flexibility to continue the use of US forces in hostile actions without the approval of Congress.

In mid-1987 only 24 percent of the public responded that they trusted President Reagan more than Congress to make the right decision on national security policy. Sixty percent had more confidence in Congress.[5] Only 34 percent of the public agreed that the President should be allowed to conduct secret operations in foreign countries without notifying anyone in Congress. Sixty-one percent disagreed.[6] Later the same year 63 percent of the public desired the President to obtain the approval of Congress to keep US ships in the Persian Gulf. Only 33 percent wanted him to be able to make the decision himself.[7]

Thus although Americans might be attracted to strong leaders (and those Presidents whom they revere were strong leaders), they are not deferential to the President, even on national security matters, and they feel most comfortable when Congress has a central role in determining national security policy. This is the cultural context within which the President attempts to lead Congress. It forces him into an active leadership role, but at the same time it complicates his efforts by supporting an independent position for Congress.

Leading the Public

Leading the public is perhaps the ultimate tool of the political leader in a democracy. It is difficult for other

authorities such as Members of Congress to deny the legitimate demands of a President with popular support. As a result, the President is constantly engaged in substantial endeavors to obtain the public's support for himself and his policies in order to influence Congress. Yet trying to lead and succeeding at it are quite different. To what extent is the President able to lead the public on national security policy in order to convince Congress to support him?

Leading the public in order to lead Congress may prove very frustrating for the White House. Americans are typically disinterested in politics, especially national security policy matters. Thus, it is often difficult for the President to get his message through. The public may misperceive or ignore even the most basic facts regarding a Presidential policy. Following his nationwide televised speech on the invasion of Grenada, only 59 percent of the people could even identify the part of the world in which the island nation was located. As late as 1986, 62 percent of Americans did not know which side the United States supported in Nicaragua, despite extensive, sustained coverage of the President's policy in virtually all components of the media.[8]

In some instances the public's inattention may have direct consequences for the President. For example, although 40 percent of those who knew which side the United States supported in Nicaragua were willing to aid the contras, only 16 percent of those who did not know were willing to support the President's policy of aiding the rebels.[9]

Americans are difficult to persuade and mobilize not only because of their apathy but also because of their predispositions. Most people most of the time hold views and values that are anchored in like-minded social groups of family, friends, and co-workers. Both their cognitive needs for consistency and their uniform (and protective) environments pose formidable challenges for political leaders to overcome. In the absence of a national crisis, most people are not open to political appeals.

Instead, citizens have psychological defenses that screen the President's message and reenforce their predispositions. A study of persons watching Ronald Reagan speak on television found that those who were previously supportive of him had a positive response to his presentations while those previously disapproving of him became irritated at his performance.[10]

SUCCESS OF APPEALS A President trying to influence public opinion faces many obstacles. John Kennedy once sardonically suggested an exchange from *King Henry IV*, part I, as an epigraph for Clinton Rossiter's famous work, *The American Presidency:*

> *Glendower:* "I can call spirits from the vasty deep."
> *Hotspur:* "Why, so can I, or so can any man. But will they come when you do call them?"[11]

What we know about Presidential leadership of public opinion on national security policy provides a mixed answer to Shakespeare's question. National security policy is more distant from the lives of most Americans than is domestic policy, and the public sees it as more complex and based on specialized knowledge. Thus it is reasonable to expect people to defer more to the President on national security issues than on domestic issues that they can directly relate to their own experience. Studies have shown public opinion undergoing changes in the direction of the President's policies on testing nuclear weapons,[12] relations with the People's Republic of China,[13] and both escalating and de-escalating the war in Vietnam.[14] We do not know the cause of this opinion change, however.

In October 1983, 241 US marines were killed in their barracks in Beirut, Lebanon. A few days later the United States invaded the island of Grenada. President Reagan made a nationwide televised address to the public, reporting on these events and seeking support. One national poll found that approval of his handling of Lebanon increased from 41 percent to 52 percent and of Grenada from 53 percent to 63 percent following the speech.[15]

Another national poll found that approval of his handling of Grenada increased from 46 percent to 55 percent. Of those who heard the President's speech, 65 percent approved, while only 47 percent of those who did not hear the speech approved.[16] This show of support was extremely useful for Reagan. It preempted congressional criticism, which was building until poll results indicating public approval of the President were released.

A study in 1979 first ascertained public opinion on six potential responses to the hostage crisis in Iran. The author asked those who opposed each option if they would change their views "if President Carter considered this action necessary." In each case a substantial percentage of the public changed its opinion in deference to the supposed opinion of the President. Between 40 percent and 63 percent of those originally opposed to each alternative altered their views in light of the hypothetical support of the President, and the greater the initial level of opposition, the more change that took place (there being a greater number of people who could potentially change their views).[17]

Similarly, a poll of Utah residents found that two-thirds of them opposed basing MX missiles in Utah and Nevada. But an equal number said they would definitely or probably support President Reagan if he decided to go ahead and base the missiles in those states.[18]

None of these studies measure the firmness of any opinion changes that occur, however. Since the public generally does not have crystallized opinions on issues, it may be swayed in the short-run, providing the President succeeds in obtaining its attention. However, this volatility also means that any opinion change is subject to slippage. As issues fade into the background or as issue positions confront the realities of daily life, opinions that were altered in response to Presidential leadership may quickly be forgotten. President Carter's embargo against shipping grain to the Soviet Union is a case in point.

Presidents face a difficult time moving public opinion in the long run. Shortly after becoming President,

Jimmy Carter made a televised appeal to the American people on the energy crisis induced by the Arab oil embargo, calling it the "moral equivalent of war." One year later the Gallup Poll found exactly the same percentage of the public (41 percent) felt the energy situation was "very serious" as before Carter's speech.[19]

There are plenty of other negative results to challenge the examples of successful leadership. In one study different respondents were asked whether they supported a proposal dealing with foreign aid. One of the groups was told President Carter supported the proposal. The authors found that attaching the President's name to the proposal not only failed to increase support for it but actually had a negative effect because those who disapproved of Carter reacted very strongly against a proposal they thought was his.[20]

Research has found that Presidential speeches on national security matters do not have more success in creating public support for the President than do other types of speeches.[21] As President, Ronald Reagan was certainly interested in policy change and went to unprecedented lengths to influence public opinion. Nevertheless, numerous national surveys since 1982 found that public support for increased defense expenditures, one of his highest priorities, was decidedly lower than when he took office.[22] Moreover, near the end of 1986 only 25 percent of the public favored the President's cherished aid to the contras in Nicaragua.[23]

Another vital factor to consider when examining Presidential leadership of the public's policy preferences is his approval level. One innovative study found that despite the mythology of the "bully pulpit," a President's ability to influence the policy preferences of the public is dependent upon his standing with it. Presidents low in the polls have little success in opinion leadership.[24] The ability to influence public opinion, in other words, simply cannot be assumed to be a given of the Presidential role.

Sometimes merely changing public opinion is not sufficient, and the President wants the public to

communicate its views directly to Congress. Mobilization of the public may be the ultimate weapon in the President's arsenal of resources with which to influence Congress. When the people speak, especially when they speak clearly, Congress listens attentively.

Yet mobilizing the public involves overcoming formidable barriers and accepting substantial risks. It entails the double burden of obtaining both opinion support and political *action* from a generally inattentive and apathetic public. If the President tries to mobilize the public and fails, the lack of response speaks eloquently to Members of Congress, who are highly attuned to public opinion.

The Reagan administration's effort at mobilizing the public on behalf of the 1981 tax cut is significant not only because of the success of Presidential leadership but also because it appears to be a deviant case—even for Ronald Reagan. His next major legislative battle was over the sale of AWACs planes to Saudi Arabia. The White House determined it could not mobilize the public on this issue, however, and adopted an "inside" strategy to prevent a legislative veto.[25]

In the remainder of his tenure the President went repeatedly to the people regarding a wide range of policies, including the budget, aid to the contras in Nicaragua, and defense expenditures. Despite his high levels of approval for much of that time, he was never again able to arouse many in his audience to communicate their support of his policies to Congress. Most issues hold less appeal to the public than substantial tax cuts.

Despite the President's extensive efforts to lead the public, it does not reliably respond to his leadership. The content and style of his public presentations, his standing in the polls when he appeals for support, the impact of factors beyond his control, and the public's frequent lack of receptivity to his leadership efforts present significant obstacles to the Chief Executive achieving his goals.

Public support, then, is not a dependable resource for the President, nor is it one that he can easily create

when he needs it to influence Congress. Leading the public is leading at the margins of the basic configurations of American politics. Most of the time the White House can do no more than move a small portion of the public from opposition or neutrality to support for the President or from passive agreement to active support. Sometimes this may be enough to influence a few wavering Senators or Representatives to back the President, and occasionally this may have a critical impact. More typically, however, the consequences of attempting to lead the public will be of modest significance.

Leading Congress

If the President cannot depend on leading Congress through leading its Members' constituents, then he must take his case directly to the Legislature. What can he expect when he does so? Is Congress open to being led? Will politics stop at the water's edge? Can the President anticipate deference or cooperation? Let us begin our discussion by briefly reviewing what others have concluded about Presidential leadership of Congress in national security.

We typically think of the President as having significant advantages in leading Congress on matters of national security. The best known formulation of this view is the "two presidencies" thesis, a staple of the literature on Executive-Legislature relations. In its original formulation in 1966, Aaron Wildavsky argued that since World War II Presidential-congressional relationships had been characterized by "two presidencies": one for domestic policy and the other for national security policy. In the latter area Presidents had much more success in dealing with Congress. National security policies, because they were perceived as important and irreversible, generally received higher priority from Presidents, who devoted more effort to obtaining their approval. In addition, the secret nature of these issues limited opposition, as did the general lack of interest, weakness, division,

and deference to the President among those who might oppose them.[26]

This perspective did not go unchallenged, however. By 1975 things looked different. Donald Peppers argued that less secrecy surrounded national security policy decisions, Members of Congress were less deferential to the President, and more persons outside the executive branch were willing and able to challenge the President. The Vietnam war had sensitized Americans to national security policy and made them more reluctant to view our involvement in world affairs as being urgent or irreversible. At the same time, the author contended, the war had shattered whatever consensus might have existed within the United States on national security policy. Finally, national security policy issues were increasingly evaluated in terms of their domestic implications. Our relations with oil-producing nations, for example, could directly affect the price that Americans paid for petroleum, and the sale of wheat to the Soviet Union could raise the cost of many food products at home. Thus, the distinction between policy areas was becoming blurred.[27]

Others compared Wildavsky's data (covering 1948 through 1964) with similar data for the years 1965 through 1975. They found that the difference between the approval rates for domestic policy initiatives and national security policy initiatives had narrowed considerably.[28]

Lee Sigelman has critiqued the use of general "boxscores" of passage of legislation that Wildavsky and others employed. Instead, he suggested, scholars should focus on the most significant votes. Thus, he examined *Congressional Quarterly*'s Key Votes on which the President had taken a stand and found little difference between domestic and national security policy issues in percentages of victories.[29]

As the findings reviewed above indicate, there is good reason to hypothesize that the two presidencies is a time-bound concept, characterizing only the 1950s and the early 1960s. Many other authors have discussed the

assertiveness of Congress in national security affairs since the mid-1960s (although they have not made systematic comparisons between domestic and national security policy support).[30]

Nevertheless, the notion that the President has significant advantages in leading Congress on national security persists in the literature as the dominant view of Presidential-congressional relations on national security. Thus, there is an obvious tension between the two presidencies thesis and arguments of a less deferential Congress than in the Eisenhower-Kennedy years. Which view is correct?

There is more involved here than an isolated, albeit important, empirical question. Whether or not the Chief Executive has a special advantage on national security matters has important implications for his ability to lead Congress on these policies. Moreover, if the President does have such an advantage, identifying the source of this extra support can help us understand the nature of his leadership resources and thus the potential of his leadership.

The data in table 1 provide a broad overview of what the Chief Executive has experienced in the way of congressional support for his national security policies. The two indexes shown in the table are *Non-unanimous Support* (composed of the average support of Members of each House on all roll-call votes on which the President has taken a stand, on which the winning side receives less than 80 percent of the votes, including paired votes) and *Key Votes* (the average support of Senators and Representatives on *Congressional Quarterly*'s selection of the key roll-call votes on which the President has taken a stand in each session of Congress). Employing these two measures covers both the broad sweep of Presidential support and the President's success in obtaining support on especially significant votes.[31]

In general the typical member of Congress supports the President on national security roll-call votes slightly

TABLE 1
Congressional Support for the President on National Security Policy (Percentages)

	House		*Senate*	
Administration	*Non-Unanimous Support*	*Key Votes*	*Non-Unanimous Support*	*Key Votes*
Eisenhower	56	58	56	59
Kennedy-Johnson	55	58	57	52
Nixon-Ford	52	48	51	51
Carter	50	48	54	53
Reagan (1981-1986)	52	46	56	53

Figures in the table represent the average support on roll-call votes of Members of Congress for the President's stands on national security policy.

Non-Unanimous Support: all roll-call votes on which the President took a stand, on which the winning side received no more than 80 percent of the vote.

Key Votes: *Congressional Quarterly*'s selection of the most important roll-call votes of the congressional session on which the President took a stand.

more than half the time. There is plenty of slippage between what the President requests and what Members of Congress are willing to give him. Certainly the data do not reveal a Legislature according the President overwhelming support on national security policy. Yet what about the relative advantage of national security policy and domestic policy?

The two presidencies thesis draws no distinction between opposition and Presidential party members and thus implies that all Members of Congress are more supportive of the White House on national security policy than on domestic policy. At the same time, scholars have commented often upon bipartisanship in national security policy, especially in the pre-Vietnam era.[32] Thus, it is possible that any increase in support for the President's national security policy proposals comes (or came) from the opposition party. If this is the case, it is an

important refinement to the two presidencies argument. If the President's advantage in leadership on national security policy is limited to those who do not usually support him, the potential of his leadership is truncated considerably.

Conversely, several studies have found that the greatest potential for the President as party leader lies in the area of national security policy.[33] In general, the largest shifts in congressional voting in response to Presidential party affiliation occur in national security policy. This is not surprising. Since most Members of Congress have more freedom from constituency and interest group pressures in national security policy than in domestic policy, they are less inhibited in following a President of their own party. Also, because the President has a greater personal responsibility for national security affairs than domestic affairs, his prestige is more involved in votes on national security policy. Thus, his fellow party members in Congress have more reason to support him in these matters in order to save him from embarrassment. In addition, it is in national security policy that Presidents are most likely to ask their party legions to shift from their typical policy stances. This reasoning implies that we may expect additional support for the President on national security policy from his own party.

Table 2 provides a summary of the relative strength of domestic and national security policy support across the last three decades. The data show that the President's party has never been a reliable resource of extra support for his national security policies. In most instances it provides *less* support for the President's national security policies than for his domestic policies. The opposition party, on the other hand, has been the locus of additional support for the White House's national security policies. Yet this additional support has diminished substantially in both quantity and reliability since its peak in the 1950s.

TABLE 2
Summary of Differences Between Congressional Support for the President on National Security and Domestic Policy
(Percentages)

Non-Unanimous Support

	House		*Senate*	
Administration	*President's Party*	*Opposition Party*	*President's Party*	*Opposition Party*
Eisenhower	−9	17	−6	18
Kennedy-Johnson	−1	8	−5	7
Nixon-Ford	−3	7	7	9
Carter	−2	3	4	−2
Reagan (1981-1986)	14	6	1	−2

Key Votes

	House		*Senate*	
Administration	*President's Party*	*Opposition Party*	*President's Party*	*Opposition Party*
Eisenhower	−2	14	−9	26
Kennedy-Johnson	2	14	−6	10
Nixon-Ford	−2	3	3	10
Carter	−6	9	−2	5
Reagan (1981-1986)	5	−11	0	−8

Figures in the table represent the average support of Members of Congress on roll-call votes for the President's national security policy stands minus their average support for the President's domestic policy stands. A negative figure indicates more support for domestic than for national security policy.

What accounts for the considerable additional support Eisenhower received from the opposition party on national security policy? Why have Eisenhower's successors not enjoyed this same advantage? Was his support the result of his leadership, indicating that the President has substantial potential to reach out to the opposition party in Congress to obtain the support he needs for national security policy? Or was it the result of other factors?

There are three alternative explanations for the flourishing of the two presidencies conduct (more success in Congress on national security matters) during the Eisenhower administration. One line of reasoning argues that the 1950s was an era of bipartisanship and deference to the President in national security policy. Eisenhower's role as a leading figure on the world stage before entering the White House and the consensus generated by the Cold War simply encouraged partisan differences in Congress to be set aside when considering national security policy matters.

If this reasoning is correct, we should find similar levels of support for the President's national security policy from members of both parties *and* from Northern and Southern Democrats. Yet, there were clear differences between Democratic and Republican national security policy support in the Senate and very substantial differences between Southern Democrats and both Republicans and Northern Democrats in both chambers.[34] Moreover, although Northern Democrats and Republicans had similar levels of support, we should not assume this is a result of bipartisanship. In addition, the bipartisan-deference thesis does not explain why Northern Democratic support *exceeded* that for Republicans in the House.

A second explanation emphasizes the relative advantage of the President in his efforts to obtain passage of his policies. It is essentially Wildavsky's argument that a President devoting his full efforts to high priority national security policy issues is too much for weak, docile, poorly informed potential congressional opponents to withstand.[35] If this hypothesis is correct, then there should not have been a decline of the two presidencies conduct until the conditions underlying the President's advantages changed.

Yet the two presidencies conduct declined while the President's relative advantages remained. One can hardly argue that national security policy was less salient in the 1960s than in the previous decade. Nor could one

maintain that Lyndon Johnson was less skilled in dealing with Congress than Dwight Eisenhower. Moreover, the reforms in Congress that complicated the President's persuasive task and increased the information resources of Congress occurred in the decade *following* the 1960s.[36] Nevertheless, the two presidencies conduct did diminish notably following Eisenhower's tenure in office. Thus the relative advantage thesis does not provide a compelling explanation for the two presidencies conduct in the 1950s.

A third explanation for the two presidencies conduct in the 1950s focuses on the substance of the President's policies. Perhaps Eisenhower received additional support from Democrats on national security policy matters simply because they agreed with his policies. Ideally, we would test this hypothesis by assessing the ideological character of Eisenhower's national security policies and the ideological leanings of each Member of Congress and then determine whether a President's policies were congruent with the views of Representatives and Senators. It is very difficult to precisely place complex sets of national security policies or views on them on an ideological scale, however.

Nevertheless, it is reasonable for us to accept the widely shared view that characterizes Eisenhower's national security policy as internationalist and, in the terms of the times, "liberal." If the policy substance hypothesis is correct, we should find that liberals in Congress gave the Republican President unusually strong support while conservatives, especially conservative Democrats, voting without the pull of party, gave him unusually weak support. This is exactly what happened. Northern Democrats, almost all of whom were liberal, gave the President impressive levels of national security policy support for members of the opposition party while Southern Democrats, almost all of whom were conservative, awarded him considerably less support, less than for any future Republican President. Republicans, torn between their generally conservative views and the

policies of their party leader, accorded the President less support than their party cohorts gave future Republican Presidents. In the House they actually gave Eisenhower less support than did the Northern Democrats.[37]

The evidence is consistent with the argument that the two presidencies conduct of the 1950s was a product of the substance of President Eisenhower's national security policies. On the other hand, the evidence does not support hypotheses emphasizing bipartisanship-deference or the relative advantages of the Chief Executive. As our discussion of our third hypothesis demonstrates, similar levels of support do not necessarily indicate bipartisanship.

The weakness of the bipartisan-deference hypothesis should not really come as a surprise. In their work on the uses of history, Neustadt and May term the oft-cited bipartisan national security policy consensus of the Truman and Eisenhower years "almost pure fantasy." Instead, this era was characterized by "bitter, partisan, and utterly consensus-free debate."[38]

We have seen why the two presidencies conduct occurred during the Eisenhower administration, but why did it decline under succeeding Presidents? Probably the most common explanation focuses on the war in Vietnam. The argument that the war shattered a bipartisan consensus on national security policy, energized congressional opposition to and skepticism of the Chief Executive, and encouraged the development of staff resources in the Legislature is too well known. Under these conditions we would expect a broad decrease in Presidential national security policy support.

We have seen, however, that the two presidencies conduct was never based on bipartisanship, deference, or relative advantage. Moreover, general support for Presidential national security policy did not fall after Vietnam. In the levels of national security policy support for the President in summary form, (table 1) the results are striking. Despite all the differences among the Presidents and the composition of Congresses and despite the

extraordinary events through which the country passed, support for the President's national security policies has remained remarkably stable (with the partial exception of *Non-Unanimous Support* in the House).

There is no question that Vietnam was a traumatic experience for the nation. Certainly it served as a catalyst for more extensive and intensive debate over national security policy and the potential for greater restraints on the President. Yet, as we have seen, it does not follow that in the end the President received less support from Congress any more than the increased use of provisions for the legislative veto in national security policy matters led to an increase in actual constraints on the White House.

To explain the decline in two presidencies conduct following the Eisenhower years, we must focus on the conditions that underlay it in the 1950s. The two presidencies conduct was confined to the opposition party. Eisenhower's combination of conservative domestic policies and internationalist national security policies elicited support from liberal Democrats for the latter, creating the gap between domestic and national security policy support upon which the two presidencies depends.

Succeeding Republican Presidents continued to offer conservative domestic policies, but their "hawkish" national security policies no longer appealed to Northern Democrats. Presidents Nixon, Ford, and Reagan did obtain relatively strong support from Southern Democrats (typically, they received more support than Kennedy or Johnson). Thus we see some signs of two presidencies conduct. Yet the consistent responses of conservative Southern Democrats to conservative Republican Presidents inhibited the development of systematic differences between national security and domestic policy support.

Democratic Presidents simply received low support on both national security and domestic policy from Republicans, who remained overwhelmingly conservative. Neither Kennedy, Johnson, nor Carter offered the

opposition national security policies that it found congenial. This undermined the basis for the two presidencies conduct.

In sum, there is less to the two presidencies conduct than meets (or met) the eye. As a description of an important characteristic in national policy making, it was largely a short-term phenomenon. As an explanation for the gap between national security and domestic policy support, it confused the forest with the trees. Presidents have enjoyed no free ride in the national security policy realm. They have generally obtained support the old fashioned way: appealing to independent authorities with the substance of policies. Policy preference, not Presidential deference, has dominated Executive-Legislature relations on national security policy.

Can the President lead Congress on national security policy? The answer is complex. Certainly the President cannot assume congressional support on national security issues. Leadership on such questions is just as great a challenge as on domestic policy matters. Thus the Chief Executive must marshall his resources and attempt to construct a winning coalition in the Legislature. Since leadership resources are limited, the President will have to choose carefully the issues on which to fight. He cannot win every battle in which he may wish to engage. Moreover, since congressional support is not completely dependable, the composition of coalitions will vary with the issue, increasing the Chief Executive's leadership burden.

Yet the President does receive congressional support for his national security policies. He ends up obtaining much, and often most, of what he requests from Congress. Some of this support is the result of the congruence of policy views between members of the Legislature and the Chief Executive, but there is also an important role for Presidential leadership.

This is not a role in which the President simply bends the Legislature to his will, however. Rather, it is leadership in the American tradition of persuasion. Presidential

leadership on national security policy, as in all other areas of policy, is leadership at the margins. Rarely are Presidents in a position to create through their own leadership opportunities for major changes in policy. They may exploit favorable conditions in their environments to bring about policy change, however. An aroused public, a favorable party balance in Congress, or events abroad can provide the setting for successful Presidential initiatives in national security policy.

Conclusion

There is no question that the Founding Fathers bequeathed the President a formidable challenge when they constructed the Constitution's separation of powers. Not only does the Chief Executive require the acquiescence of independent political actors to establish a national security policy, but these other participants, including the public, often view issues differently than the White House and are not dependably responsive to the President's efforts at leadership.

The obstacles to Presidential leadership may be distressing to some observers, especially those who value continuity, secrecy, and dispatch in the conduct of national security policy. Yet historical perspective is useful here. Congress has been intimately involved in national security matters from the beginning, and this is what the American people desire and how the Framers designed the system. It is by no means clear that the executive branch has a monopoly on wisdom or that national security policy cannot benefit from a deliberative process, even at the cost of speed and secrecy in action.

Moreover, it is not apparent that congressional involvement in national security policy has been extremely costly to the nation's long-run interests. Although one can cite cases in which Congress may have acted unwisely, there are an equal number of instances in which the executive branch can be safely accused of the same failing. At the same time, there are few examples in which the President has simply been unable to act in an

emergency because of systemic constraints. The War Powers Resolution, the most notable effort of Congress to formally constrain the President, has not proven to be a significant restriction, and systematic evidence shows that Presidents have not reduced the use of force in international relations over the past decade.[39]

Congress and the public are most likely to be concerned with national security affairs when the issues involved are salient to them. Their participation is entirely appropriate because such matters are usually at the core of defense and foreign policy. It is difficult to articulate a view of democratic government that does not accord citizens and their elected representatives a central role in important matters of national security policy. In addition, Chief Executives in a democracy need the support of the people if they are to successfully establish and implement policies that require sacrifice and moral commitments.

By examining the strategic position of Presidential leadership, we enrich our understanding of the nature of making national security policy in the United States. We must accept disagreement between the President and Congress as inevitable and adjust our expectations of Presidential leadership accordingly, recognizing that efficiency is not the only criterion by which we evaluate government. At the same time, we should not forget that the President remains the predominant figure in making US national security policy because of both his role in initiating policy and his constitutional authority to take some actions in the national security realm without congressional approval.

Increasing the potential of Presidential leadership, and thus providing more latitude for rapid policy change, would require more than changing the occupant of the Oval Office. It would necessitate changing the political system. Moreover, providing the appropriate environment for dominant Presidential leadership would require alterations in American political culture as well as the revamping of American political institutions.[40]

Such changes are both unlikely and undesirable. We are going to be living with separate institutions sharing powers for the foreseeable future. It is important that we understand the constitutional system and appreciate its advantages for conducting stable, democratic government.

Notes

1. George C. Edwards III, *Presidential Influence in Congress* (San Francisco: W. H. Freeman, 1980), chap. 2.

2. Jack Dennis, "Dimensions of Public Support for the Presidency," paper presented at the annual meeting of the Midwest Political Science Association, Chicago, 1975, tables 4, 8; Hazel Erskine, "The Polls: Presidential Power," *Public Opinion Quarterly* 37 (Fall 1973): 492, 495; News Release, *CBS News/The New York Times Poll*, September 14, 1987, table 12. An exception is Roberta S. Sigel, "Image of the American Presidency: Part II of an Exploration into Popular Views of Presidential Power," *Midwest Journal of Political Science* 10 (February 1966): 125, who found more people favoring the President leading Congress and the people rather than following what the people and Congress decided. Perhaps this is due to the survey taking place in 1966 and the sample being limited to Detroit, a population highly favorable toward the President at the time.

3. Erskine, "The Polls," pp. 499-500.

4. George H. Gallup, *The Gallup Poll: Public Opinion 1972-1977*, vol. I (Wilmington, Delaware: Scholarly Resources, 1978), pp. 210-11.

5. News Release, *CBS News/The New York Times Poll*, July 9, 1987, table 4.

6. News Release, *CBS News/The New York Times Poll*, July 17, 1987, table 11.

7. News Release, *CBS News/The New York Times Poll*, September 23, 1987, table 14.

8. News Release, *CBS News/The New York Times Poll*, April 15, 1986, table 16.

9. "Polls Show Confusion on Aid to Contras," *New York Times*, April 15, 1986, p. A6.

10. Roberta Glaros and Bruce Miroff, "Watching Ronald Reagan: Viewers' Reactions to the President on Television," *Congress and the Presidency* 10 (Spring 1983): 25-46.

11. Theodore C. Sorensen, *Kennedy* (London: Hodder and Stoughton, 1965), p. 392.

12. Eugene J. Rossi, "Mass and Attentive Opinion on Nuclear Weapons Tests and Fallout, 1954-1963," *Public Opinion Quarterly* 29 (Summer 1965): 280-97.

13. Robert S. Erikson, Norman R. Luttbeg, and Kent L. Tedin, *American Public Opinion: Its Origins, Content, and Impact*, 2nd ed. (New York: Wiley, 1980), p. 144.

14. John E. Mueller, *War, Presidents and Public Opinion* (New York: Wiley, 1973), pp. 69-74.

15. Barry Sussman, "Reagan's Talk Gains Support for Policies," *Washington Post*, October 30, 1983, pp. A1, A18. For another national security policy example see Samuel Kernell, *Going Public* (Washington, DC: Congressional Quarterly, 1986), pp. 153-67.

16. News Release, *CBS News/The New York Times Poll*, October 28, 1983, p. 2.

17. Lee Sigelman, "Gauging the Public Response to Presidential Leadership," *Presidential Studies Quarterly* 10 (Summer 1980): 428-29.

18. "Most Utah Residents Say 'No' to MX Missile Deployment," Bryan-College Station *Eagle*, September 15, 1981, p. 5A. See also Dan Thomas and Lee Sigelman, "Presidential Identification and Policy Leadership: Experimental Evidence on the Reagan Case," in George C. Edwards III et al., eds., *The Presidency and Public Policy Making* (Pittsburgh: University of Pittsburgh Press, 1985), pp. 37-49.

19. "Carter Fails to Educate Public on Energy Crisis," *New Orleans Times Picayune*, April 30, 1978, section 1, p. 21. For examples from other Presidents see Walter Bunge, Robert Hudson, and Chung Woo Suh, "Johnson Information Strategy for Vietnam: An Evaluation," *Journalism Quarterly* 45 (Autumn 1968): 419-25; Halford Ross Ryan, "Harry S Truman: A Misdirected Defense for MacArthur's Dismissal," *Presidential Studies Quarterly* 11 (Fall 1981): 576-82.

20. Lee Sigelman and Carol K. Sigelman, "Presidential Leadership of Public Opinion: From 'Benevolent Leader' to Kiss of Death?," *Experimental Study of Politics* No. 3, (1981), pp. 1-22. See also Pamela Johnston Conover and Lee Sigelman, "Presidential Influence and Public Opinion: the Case of the Iranian Hostage Crisis," *Social Science Quarterly* 63 (June 1982): 249-64.

21. Lyn Ragsdale, "Presidential Speechmaking and the Public Audience: Individual Presidents and Group Attitudes," *Journal of Politics* 49 (August 1987): 704-36.

22. Seymour Martin Lipset, "Beyond 1984: the Anomalies of American Politics," *PS* 19 (Spring 1986): 924. See also "Opinion Outlook," *National Journal*, June 13, 1987, p. 1550.

23. News Release, *CBS News/The New York Times Poll*, December 1, 1986, table 5. See also "Opinion Roundup," *Public Opinion*, September/October 1987, p. 24, for a summary of public support for aid to the contras. For a broader comparison of public opinion and the Reagan administration's policies, see John E. Reilly, ed., *American Public*

Opinion and U.S. Foreign Policy 1987 (Chicago: Chicago Council on Foreign Relations, 1987), chaps. 5-6.

24. Benjamin I. Page and Robert Y. Shapiro, "Presidential Leadership Through Public Opinion," in Edwards, et al., *The Presidency and Public Policy Making*, pp. 22-36. See also Kernell, *Going Public*, pp. 155-61.

25. See, "Reagan's Legislative Strategy Team Keeps His Record of Victories Intact," *National Journal*, June 26, 1982, p. 1130.

26. Aaron Wildavsky, "The Two Presidencies," *Trans-Action* 4 (December 1966): 7-14.

27. Donald A. Peppers, "'The Two Presidencies': Eight Years Later," in Aaron Wildavsky, ed. , *Perspectives on the Presidency* (Boston: Little, Brown, 1975).

28. Lance T. LeLoup and Steven A. Shull, "Congress Versus the Executive: The 'Two Presidencies' Reconsidered," *Social Science Quarterly* 59 (March 1979): 704-19.

29. Lee Sigelman, "A Reassessment of the Two Presidencies Thesis," *Journal of Politics* 41 (November 1979): 1195-1205. Also see the exchange between Shull and LeLoup and Sigelman: Steven A. Shull and Lance T. LeLoup, "Reassessing the Reassessment: Comment on Sigelman's Note on the 'Two Presidencies' Thesis," *Journal of Politics* 43 (May 1981): 563-64; Lee Sigelman, "Response to Critics," *Journal of Politics* 43 (May 1981): 565.

30. See, for example, Ronald C. Moe and Steven C. Teel, "Congress as Policy-Maker: A Necessary Reappraisal," in Ronald C. Moe, ed., *Congress and the President* (Pacific Palisades, Calif.: Goodyear, 1971); John F. Manley, "The Rise of Congress's Foreign Policy-Making," *Annals of the American Academy of Political and Social Science*, no. 337 (1971), pp. 60-70; Edward A. Kolodziej, "Congress and Foreign Policy: the Nixon Years," in Harvey C. Mansfield, Sr., ed., *Congress Against the President* (New York: Praeger, 1975); I. M. Destler, "Executive-Congressional Conflict in Foreign Policy: Explaining It, Coping with It," in Lawrence C. Dodd and Bruce I. Oppenheimer, eds., *Congress Reconsidered?, Third Edition* (Washington, DC: Congressional Quarterly, 1985); Thomas M. Franck and Edward Weisband, *Foreign Policy by Congress* (New York: Oxford University Press, 1979).

31. For a more extensive discussion of these measures, see George C. Edwards III, "The Two Presidencies: A Reevaluation," *American Politics Quarterly* 14 (July 1986): 247-63; and George C. Edwards III, "Measuring Presidential Success in Congress: Alternative Approaches," *Journal of Politics* 47 (May 1985): 667-85.

32. See, for example, Samuel P. Huntington, *The Common Defense* (New York: Columbia University Press, 1961); Julius Turner and Edward V. Schneier, Jr., *Party and Constituency Pressures on Congress, Revised Edition* (Baltimore: Johns Hopkins University Press, 1970).

33. Mark Kesselman, "Presidential Leadership in Foreign Policy," *Midwest Journal of Political Science* 5 (August 1961): 284-89; Mark Kesselman, "Presidential Leadership in Congress on Foreign Policy: A Replication of a Hypothesis," *Midwest Journal of Political Science* 9 (November 1965): 401-6,; Charles M. Tidmarch and Charles M. Sabatt, "Presidential Leadership Change and Foreign Policy Roll-Call Voting in the U.S. Senate," *Western Political Quarterly* 25 (December 1972): 613-25; Aage R. Clausen, *How Congressmen Decide: A Policy Focus* (New York: St. Martin's, 1973), chap. 8; Aage R. Clausen and Carl E. Van Horn, "The Congressional Response to a Decade of Change: 1963-1972," *Journal of Politics* 39 (August 1977): 632, 635, 653; Herbert B. Asher and Herbert F. Weisberg, "Voting Change in Congress: Some Dynamic Perspectives on an Evolutionary Process," *American Journal of Political Science* 22 (May 1978): 409-16; Malcolm E. Jewell, *Senatorial Politics and Foreign Policy* (Lexington, Ky.: University of Kentucky Press, 1962), pp. 31-33, 41-46. See also Barbara Sinclair, *Congressional Realignment, 1925-1978* (Austin, Tx.: University of Texas Press, 1982), pp. 84-85, 108-10, 120-21, 164-65, 174; Kingdon, *Congressmen's Voting Decisions*, pp. 173-75, 178.

34. George C. Edwards III, *At the Margins: Presidential Leadership of Congress* (New Haven: Yale University Press, 1989), pp. 58-59, 64.

35. Wildavsky, "The Two Presidencies."

36. See, for example, Edwards, *Presidential Influence in Congress*, pp. 193-96.

37. Edwards, *At the Margins*, pp. 58-64.

38. Richard E. Neustadt and Ernest R. May, *Thinking in Time: The Uses of History for Decision Makers* (New York: Free Press, 1986), pp. 258-59.

39. Philip D. Zelikow, "The United States and the Use of Force: A Historical Summary," in George K. Osborn, Asa A. Clark IV, Daniel J. Kaufman, and Douglas E. Lute, eds., *Democracy, Strategy, and Vietnam* (Lexington, Mass.: Lexington, 1987), pp. 31-81.

40. For a comprehensive discussion of the impact of the Constitution on the making of national security policy, see George C. Edwards III and Wallace Earl Walker, eds., *National Security and the Constitution* (Baltimore: Johns Hopkins University Press, 1988).

EXECUTIVE PREROGATIVES, THE CONSTITUTION, AND NATIONAL SECURITY

By JOSEPH E. GOLDBERG
National Defense University

Whatever the extent of Presidential power on more tranquil occasions, and whatever the right of the President to execute legislative programs as he sees fit without reporting the mode of execution to Congress, the single Presidential purpose disclosed on this record is to faithfully execute the laws by acting in an emergency to maintain the status quo, thereby preventing collapse of the legislative programs until Congress could act.

—Chief Justice Frederick M. Vinson

EDMUND BURKE, THE GREAT EIGHTEENTH-CENTURY BRITish philosopher, carefully distinguished between prudential judgment and "metaphysical" or "theoretical" reasoning. Prudence was the concern of the statesman, and the statesman's concern was with the good of a particular regime, while the philosopher's concern was with truth, which is abstract and not necessarily rooted in a concrete political circumstance.

The delegates to the Federal Convention of 1787 met in Philadelphia to resolve the major issue of the moment. The Founding Fathers were concerned with the circumstances surrounding a particular concrete political circumstance: an accepted realization that the Articles of

This paper was first published in *The Atlantic Community Quarterly*, Spring 1988.

Confederation, which had served as the governing instrument since independence from Great Britain, had not provided sound government.[1] There was general consensus among the delegates that the Articles of Confederation had resulted in a feeble union, and that there must be an energetic executive under a republican form of government. They were, however, aware of the difficulty imposed by the necessity of reconciling these two conditions, and there was disagreement as to ways of resolving the tension between republican energy and republican virtue.

Although the Founding Fathers were statesmen, not philosophers, they had reflected upon both the philosophic theories of politics as well as the annals of political life. The founding of the American Republic, consequently, is one of those rare moments in history that combine deliberation and action.

Republican Government

Both the Federalists, who advocated an extended commercial republic, and the anti-Federalists, who supported a small agrarian republic, agreed that the republican form of government was most desirable.[2] No other form of government, Madison wrote in *Federalist*, No. 39, "would be reconcilable with the genius of the people of America...." A republican form of government, Madison continued, is

> a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it....

Madison's exposition of the principles of the republican form is true to the etymology of the very word *republican* (from the Latin *res publica*, literally, "the public thing").

The great debate that took place within the Constitutional Convention was not over the desirability of republican government but how best to preserve the virtues of republican government while securing the natural rights of American citizens. The intent of the republican government is to secure the natural rights of its citizens. In this sense, the ends of government stated in the Preamble to the Constitution reflect the modern natural rights doctrines of Hobbes and Locke, which constitute the informing principles of modern liberal democracies. Thus, to ensure man's natural rights, government is bound to rule by law. Both governed and governing are bound by law itself to ensure that the law is promulgated in an acceptable way, that the law is known, and that the law is applied equally. The fundamental law, the Constitution, provides the procedures by which law is promulgated and applied. The great theoretical contribution that the Founding Fathers made to the science of politics was the construction of a form of government that provided republican cures for republican ills.

Establishment of a Republican Presidency

Following the Revolutionary War, State constitutions—with but few exceptions—established weak executive branches of government. Strong executives were identified in the minds of the people as a threat to their individual liberties. Charles Thatch points out in his classic study, *The Creation of the American Presidency*, that the outstanding characteristics of the chief magistracy in the States were short terms, strict limitations on reeligibility, and election by the legislature.[3] State executives could lay no real claim to executive independence from the legislative will, resulting in State governments that were unable to moderate the demands of the people and provide stable government. Speaking on the floor of the Constitutional Convention, James Madison characterized the lessons drawn from the state experiences:

> Experience had proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than cyphers; the legislatures omnipotent. If no effective check be devised for restraining the instability and encroachment of the latter, a revolution of some kind or the other would be inevitable.[4]

Article VIII of the Articles of Confederation provided for the establishment of a Committee of the States composed of one delegate from each of the States. The committee appointed other committees and civil officers necessary to conduct the general affairs of the nation, and from the Committee of the States one delegate would be selected to serve "in the office of president." His term of office was limited to one year and his general responsibilities were those of a presiding officer. Like the State experiences, the lessons learned from the years under the Articles of Confederation pointed to the need for a strong executive capable of providing strong administration and effective leadership.

Both the State and national experiences under the Articles of Confederation demonstrated the dangers of governments invested with insufficient means to fulfill the responsibilities entrusted to them by the people. The critical task for the architects of the American regime was to create an energetic executive compatible with the republican form of government. Both Federalists and anti-Federalists recognized the value of an energetic executive.

Writing in *Federalist*, No. 70, Alexander Hamilton expressed the view that "energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws...."[5] As de Tocqueville observed, "The lawgivers of the Union appreciated that the executive power could not worthily and profitably carry out its task unless it was given more stability and strength than were granted in the individual states."[6]

One of the leading anti-Federalists, George Mason, argued on the floor of the Constitutional Convention on June 4 that one of the advantages of a unitary executive was the "secresy [*sic*], the dispatch, the vigor and energy which the government will derive from it, especially in time of war."[7] Mason quickly pointed out that despite his belief that a strong executive was necessary, "the government will of course degenerate ... into a monarchy—a government so contrary to the genius of the people that they will reject even the appearance of it."[8] As was the case with many of the anti-Federalists, Mason feared that the power of a unitary executive would be directed against the freedom of the States.

Despite his recognition that executive energy was desirable, he proposed the creation of a multiple executive consisting of three persons, one each from the northern, middle, and southern states. This scheme would have created an executive incapable of good government. But such an executive would have been incapable of mischief at the expense of the States.

At the other extreme Alexander Hamilton argued that there could not be good government without a good executive, a view he later articulated in *Federalist*, No. 70, when he contended that "we ought to go as far in order to attain stability and permanency, as republican principles will admit.[9] Republican principle, he proposed, would allow the establishment of a legislature in which one branch, the Senate, held their offices for life or for good behavior and an executive was elected to serve during good behavior. A convincing argument can be made that Hamilton conceived of a strong republican executive and a permanent Senate as a means of restraining the excesses of popular government, but the recognition of such excesses does not mean that Hamilton was an enemy of republicanism. Hamilton's sober reflections on the strengths and weaknesses of the form of government he most desired are reminiscent of the statesman's careful reflections on political principles. He was not a blind partisan of republicanism, but a thoughtful one.

The commitment to republican principles was so pervasive among both Federalists and anti-Federalists that the authors of the *Federalist Papers* (in this case Hamilton) were forced to deny that the executive department of the proposed government was the embryo of a future monarchy. *Federalist*, No. 67 through No. 71, emphasized the republican character of the proposed Presidency and carefully argued that the American executive branch would not resemble the British monarchy. The fact that Hamilton constructed his arguments to show that the Presidency was consistent with the genius of republican government demonstrates the strength of the fear of growing monarchism among the opposition.

Whether or not Hamilton believed that his proposal could be adopted cannot be answered, but there is little question that Hamilton's plan introduced into the constitutional deliberations the most explicit statement favoring a strong national executive with republican energy. In *Federalist*, No. 70 through No. 77, Hamilton identified the ingredients of an energetic executive: unity, duration, adequate provision for its support, and competent powers.

A unitary executive, Hamilton states in *Federalist*, No. 70, is more conducive to "decision, activity, secrecy, and dispatch." An executive consisting of two or more is always in danger of differences, thus inviting dissension within the branch. Further, such dissension would weaken the dignity and authority of the office, which would in turn frustrate "the most important measures of the government, in the most critical emergencies of the state."[10] Such disputes within a plural executive would, he emphasized, open the community to irreconcilable factional dispute.

Hamilton contended in *Federalist*, No. 70, that unlike the executive branch, where quickness of action is desirable, "in the legislature, promptitude of decision is oftener an evil than a benefit."[11] A decision or resolution of an issue, Hamilton argued, suggests that the opposition has been put to rest. A legislature, unlike an

executive, benefits from differences of opinion precisely because such differences force the body to be deliberative. Deliberation and circumspection are necessary to moderate the excesses of the majority. While dissension is appropriate for the deliberative body, such dissension is inappropriate and harmful to the role of the executive because conflict weakens the necessary ingredients—vigor and expedition—so vital to the office. This is particularly true with regard to the President's ability to conduct war. "In the conduct of war, in which the energy of the Executive is the bulwark of the national security, every thing would be to be apprehended from its plurality."[12] As Hamilton later argued in *Federalist*, No. 74, "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[13] The conduct of war, he adds, requires directing and employing the common strength of the nation.

De Tocqueville summarizes the dilemma of Executive power. "The American lawgivers had a difficult task to fulfill; they wanted to create an executive power dependent on the majority that yet should be sufficiently strong to act freely on its own within its proper sphere."[14] The Presidency, consequently, must be understood in light of the entire structure established at the Constitutional Convention. As de Tocqueville and Hamilton state, a republican government depends upon the majority. The distribution of power, or more properly stated, the assignment of executive responsibilities, was purposefully designed. The "framers" distributed functions considered to be natural to each of the branches of government, despite the existence of some areas of ambiguity. The distribution of the war-making powers is an example of this problem.

An additional reason led the founders to believe that the country would be safer with the President in control of the military. *Federalist*, No. 10, identifies the propensity of popular government to fall victim to the dangerous

vice of faction—especially majority faction.[15] Irresponsible majorities, acting in response to the spirit of the moment, constitute a greater threat to popular government than the potential dangers of monarchy and aristocracy.

For Hamilton the Presidency should be a check upon the excesses of the populace, and Gouverneur Morris went so far on July 19 as to argue that it was necessary for the executive to be the "guardian of the people, even of the lower classes, agst. Legislative tyranny, against the Great & the wealthy who in the course of things will necessarily compose—the Legislative body."[16] At the time of the founding, legislative tyranny was feared as much if not more than executive tyranny. This, in fact, was the original justification for the creation of a bicameral legislature: to retard legislative action and promote deliberation. De Tocqueville observed that "the Americans could not eliminate that tendency which leads legislative assemblies to take over the government, but they did make it less irresistible."[17] De Tocqueville's observation, in fact, parallels that made in *Federalist,* No. 71, where Hamilton added, "In governments purely republican, this tendency is almost irresistible."[18] Hamilton's argument is worth stating at length:

> The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.[19]

James Madison, writing in *Federalist,* No. 51, recognized that the Constitution was designed to check the Congress (as mentioned above by dividing the legislature into two branches, each one having different modes of

election and different principles of action) and fortify the executive branch. Each branch of government was given sufficient constitutional means and personal motives to resist encroachment by the other. In Madison's words, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[20]

There is little doubt that the control of the military was viewed as a necessary but potentially dangerous weapon of power. The Founding Fathers recognized the dangers that a standing army posed to the liberties of a country, but they also recognized that a primary failing of the Articles of Confederation was their inability to guarantee support for the adequate defense against both foreign attack or domestic instability. The Constitution entrusted an army to the national government and not the State governments. For this fundamental law, the authors were required to provide adequate justification. In *Federalist,* No. 25, Hamilton observes that because the army potentially was such a dangerous weapon of power, it was better to entrust such authority in those hands "of which the people are most likely to be jealous, than in those of which they are least likely to be jealous."[21] Of special interest is Hamilton's reference to a now familiar theme, "For it is a truth, which the experience of ages has attested, that the people are always most in danger when the means of injuring their rights are in the possession of those of whom they entertain the least suspicion."[22]

Hamilton, in *Federalist,* No. 69, compared the President's power as Commander in Chief with that possessed by the British monarch and the governor of New York, the State whose constitution provided its executive with the greatest amount of power. Hamilton emphasized that in comparison to both offices, the Presidential authorization is limited by the fact that he "will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into actual service of the Union." Second, whereas the Presidential authority enables him to be the supreme commander and director

of the military and naval forces, the British king can both declare war and raise and regulate the armies and fleets.[23] The entire point of *Federalist,* No. 69, is to demonstrate how limited the Presidential grant is in comparison to other executives.

The power to conduct or wage war and the constitutional authority as Commander in Chief were viewed as executive responsibilities because of the ability of the unitary executive to act with secrecy, dispatch, vigor, and energy and because the executive was more likely to be scrutinized for abuse of power than the legislature within a republican form of government.

The Ends of Republican Government

The Founding Fathers believed that the constitutional design of the proposed republic would provide the means by which the abuse of power could be prevented. Essential to that design was the provision of sufficient strength so that the government could fulfill the desired ends. John Marshall characterized Alexander Hamilton's opinion on this matter:

> It was known that, in his judgment, the constitution of the United States was rather chargeable with imbecility, than censurable for its too great strength; and that the real sources of danger to American happiness and liberty, were to be found in its want of the means to effect the objects of its institutions;—in its being exposed to the encroachments of the states,—not in magnitude of its powers.[24]

How much power must be granted to the newly created government could not be ascertained with precision. As John Marshall was later to argue in *McCulloch v. Maryland,* "the government, which has a right to do an act and has imposed on it the duty of performing that act, must according to the dictates of reason, be allowed to select the means."[25] The Constitution, unlike a legal code, did not intend to designate "all [of] the subdivisions of ... its great powers in the Fundamental Law."[26] Marshall's opinion, of course, referred specifically to the powers of

Congress as stipulated in article I, section 8, of the Constitution, but the argument is applicable to other articles as well. If the end of government is legitimate and within the scope of the Constitution, then there is a responsibility to use those means available.

Writing in *Federalist*, No. 23, Hamilton raised the issue of what was necessary for the common defense. The government must raise armies, build and equip fleets, prescribe rules for the government of both, direct their operations, and provide for their support. What is critical is Hamilton's formulation of how the powers necessary for the common defense should be allocated

> These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.[27]

Because no one could foresee the shape of dangers that might arise in the future, the means to meet them should not be shackled with constitutional restraints. Hamilton stressed *that* "a government, the Constitution of which renders it unfit to be trusted with all the powers *which* a free people *ought to delegate to any government*, would be an unsafe and improper depository of the NATIONAL INTERESTS, wherever THESE with propriety be confided, the coincident powers may safely accompany them."[28]

As a sovereign entity, the United States is invested with all the powers, rights, immunities, and privileges recognized by international law. As James Wilson described it, "When the United States declared their independence, they were bound to receive the Law of Nations in its modern state of purity and refinement." In 1936, Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corporation* echoed Wilson's position. "By the Declaration of Independence, 'the Representatives of the United States of America' declared the United (not the several) Colonies to be free and 'independent states' and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.'"[29]

Foreign relations power, as such, is exclusively a power of the national government. Article I, section 10, of the Constitution restricts State action: "No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal," or *without the consent of Congress*, enter into any agreement or compact with a foreign power.

Despite the fact that the United States is a member of the family of nations and enjoys those powers of sovereignty, the decision as to how those powers are to be employed, rights to be maintained, and responsibilities fulfilled must still be delegated to specific offices. That specification is done broadly by the Constitution. The Constitution commits these powers to the political discretion of the President and Congress. And as Marshall argued in *Marbury v. Madison:*

> This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.
>
> The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.[30]

But though desirous of an energetic government capable of fulfilling its constitutional ends, the Founding Fathers imposed limits. Constitutional government is opposed to arbitrary rule. Unlike arbitrary rule where heads of government can engage in any activity at their will for whatever end they may choose, limited government restricts both the ends and means of government.

Yet government should be limited for some purpose or end. For the United States, the limitation is to secure

the natural rights of its citizens. Thus, government can be limited and at the same time energetic—a point emphasized in the political teachings of Hamilton and Marshall. Stating this point in *United States v. Maurice et al.*, Marshall said, "[The United States'] powers are unquestionably limited; but while within those limits, it is perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely in order to accomplish the objectives of its institutions."[31]

Prerogative

There are times, however, when a government confronts a political situation that is unpredictable, or deviates from experience or expectation. The condition of war, for example, is not an everyday condition nor is civil unrest or failure of a nation's financial structure. The national interest may require that action be taken that either has not been provided for in law or would be contrary to what the law clearly states. This power to act according to discretion for the public good without prescription of law, and sometimes against it, is the power of prerogative. Prerogative received its clearest statement in chapter XIV of John Locke's *Second Treatise of Civil Government*. Locke stated that in those instances where the law cannot provide for a remedy, authority to act "must necessarily be left to the discretion of him, that has the Executive Power in his hands, to be ordered by him, as the publick good and advantage shall require...."[32]

A.V. Dicey's monumental study, *Introduction to the Study of the Law of the Constitution*, identifies the origin of prerogative not with an act of Parliament but with "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[33] Dicey points out that at one time the king was in fact as well as in name "the sovereign." William Blackstone's *Commentaries on the Laws of England*, written from

1765-69, suggested in book I that the royal prerogative was invested in royal hands by the British constitution. Prerogative was placed in a single hand, Blackstone argues, for the purpose of unanimity, strength, and dispatch. If the power were not unitary, then prerogative would be subject to many wills and, "if disunited and drawing different ways, create weakness in a government: and to unite those several wills, and reduce them to one, is a work of more time and delay than exigencies of state will afford."[34]

Dicey argued that from the time of the Norman Conquest to the Revolution of 1688, the Crown did possess many of the attributes of sovereignty. During the reign of the Stuarts, the doctrine of prerogative was maintained not only by the king but by those who favored an increase in royal authority.[35] But, he argued, prerogative as understood during genuine monarchical power no longer existed. Hamilton, writing in *Federalist,* No. 26, made the same point as Dicey. With specific reference to the right of the British monarch to maintain a standing army, Hamilton points out that prerogative existed in England for a long time after the Norman Conquest. Gradually, however, "inroads were ... made upon the prerogative, in favor of liberty, first by the barons, and afterwards by the people, till the greatest part of its most formidable pretensions became extinct."[36]

The great English historian, T.B. Macaulay, writing in *The History of England,* traces the limitations on the royal prerogative from prohibiting legislation without parliamentary approval, imposing taxes without parliamentary consent, and limiting the king's administration of the realm.[37]

Nevertheless, Dicey believed that the prerogative was transformed in British Government into parliamentary conventions. We may use the term "prerogative" as

> equivalent to the discretionary authority of the executive, and then lay down that the conventions of the constitution are in the main precepts for determining the mode and spirit in which the prerogative is to be exercised, or (what

> is really the same thing) for fixing the manner in which any transaction which can legally be done in virtue of the Royal prerogative (such as the making of war or the declaration of peace) ought to be carried out.[38]

Given the rise of parliamentary supremacy in Great Britain, the discretionary power of the monarch was defined and moderated through the sovereign body. Discretionary authority still exists, but that authority is "constitutionalized." Given the fact that the British Constitution is unwritten and an act of Parliament stands as the supreme expression of what is necessary for the public good, the prerogative is no longer monarchical but now parliamentary. Prerogative, itself, has accompanied the transformation of the British regime from a monarchy to an aristocracy and ultimately to a democracy.

Unlike the British Parliament, the American Legislature is not supreme. Constitutionally, acts of Congress must be in conformity with the fundamental law. Arguing in *Federalist*, No. 78, Hamilton emphasized how important it is for limited constitutional government to have a judicial branch and not the Legislature or the Executive to judge legislative action.

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.[39]

As Marshall emphasized in *Marbury v. Madison*, the original and supreme will of the people expressed itself in the Constitution. The authority of that fundamental law organizes and assigns to different branches their respective powers—not the Legislature, and not the Executive. As a consequence, the delegation of discretionary power to act for the public good cannot emanate from the Legislature, from the Executive, or from the Court. The

power to so act for the public good must spring from the Constitution itself.

James Wilson, an influential delegate to the Constitutional Convention from Pennsylvania, had reviewed the question of prerogative and its abuses by Charles I and later by Parliament itself in "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," 1774. Wilson did not object to prerogative itself, but to the abuse of prerogative, concluding that "a discretionary power of acting where the laws are silent, is absolutely necessary, and that this prerogative is most properly entrusted to the executor of the laws."[10] Like Locke, Wilson recognized that the power of prerogative exists for the purpose of serving "public freedom or utility."

Wilson, like other delegates to the Constitutional Convention, recognized the need for discretionary authority. But like others at the Philadelphia convention, Wilson recognized that the form of government established by the deliberations would not permit a simple adaptation of the British form. On June 1, Wilson said that "he did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not [appertaining to and] appointed by the Legislature."[11]

Wilson's June 1 speech is revealing for a number of reasons. First, the Constitution does not follow the British model, a point already made. Second, prerogative itself is not mentioned in the Constitution. An explicit grant of prerogative power is not to be found in any of the articles of the Constitution. And third, though prerogative itself is not explicitly mentioned in the fundamental law, many of the powers that are associated with prerogative are explicitly mentioned in article II. Section 2 of the Constitution provides the President the "power to grant reprieves and pardons for offenses against the United

States, except in cases of impeachment," as well as establishing the President as "commander-in-chief of the army and navy of the United States; and of the militia of the several States, when called into the actual service of the United States." Section 3 grants that the President "shall receive ambassadors and other public ministers." All of these powers, together with his temporary veto power, owed their origin to the royal prerogative.

Constitutional Prerogative and the Executive

Although prerogative itself cannot be found in the Constitution, powers that owed their origin to prerogative can be found. For this reason, Presidents have been able to act according to discretion for the public good without prescription of law and sometimes against it when, *in their judgment*, such actions are necessary. And, as expected, whenever such actions have taken place, the constitutionality of those actions has been called into question. The fact that discretionary action can take place and is challenged on its constitutionality is to be expected. First, unlike the British system, which can resolve such matters through acts of Parliament, the American form of government has no such easy resolution. Because executive action most often touches upon the constitutional grants of power given to the Legislature, notably in the conduct of foreign affairs, confrontation occurs between Congress and the President. But because the American founders had the wisdom to deny the strongest branch of government, the Congress, the ultimate authority to decide these issues, the issues have ultimately been resolved through constitutional review by the Supreme Court. The founders thus successfully constitutionalized the power of prerogative.

In almost all instances where Presidents have acted in the name of the public good without expressed constitutional delegation of authority, they have justified their actions on constitutional grounds. These justifications have recognized the lack of expressed constitutional

prohibition against the action; have contended that the preservation of the Constitution itself depended upon swift executive action; have justified discretionary action on the basis of their oath of office or on the wording of another portion of article II such as the responsibility to take care that the laws be faithfully executed; or have supported such action in terms of their responsibilities as Commander in Chief of the Army and the Navy.

A historical examination of these issues is beyond the scope of this paper. The right of discretionary action for the public good will continue unsettled as long as future Presidents will be forced to act swiftly and often without legislative or constitutional authorization. There is strength in the Founding Fathers' position that "because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them," the powers of national defense must remain unlimited. The greater danger is to insist upon strictly defined limits upon executive action. Such legislation violates the spirit of the fundamental law and could preclude a necessary response required for national defense.

Ultimately, the issue of prerogative poses the question of confidence in the experiment of free government: an ability to have trust in elected officials and the structure of government set in place to correct imbalances that may arise. Whether the greater danger to national liberty and freedom rests with executive action in foreign affairs unfettered by legislative resolutions or an Executive unable to act quickly in the realm of foreign affairs because of legislative enactment remains the critical question. The formulation of the problem in this way recalls Hamilton's words in *Federalist*, No. 25:

> We must expose our property and liberty to the mercy of foreign invaders and invite them by our weakness to seize the naked and defenseless prey, because we are afraid that rulers, created by our choice, dependent on our will, might endanger that liberty, by an abuse of the means necessary to its preservation.

> ... nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed.

Notes

1. The extent to which the delegates to the Constitutional Convention adhered to the mandates from Annapolis (September 1776) or from Congress (February 1787) to reform the Articles of Confederation was of some controversy during the ratification of the Constitution. What is evident from the debates in Philadelphia and in the State Ratifying Conventions is that the framers convinced the delegates that the Articles themselves were in principle incapable of being formed. See the argument advanced in the *Federalist*, No. 40.

2. I am indebted to Martin Diamond, "Democracy and *The Federalist*: A Reconsideration of the Framers' Intent," *American Political Science Review* LIII (March 1959): 52-68, for his scholarship on this issue as well as others relating to the American founding.

3. Charles C. Thatch, Jr., *The Creation of the American Presidency 1775-1789: A Study in Constitutional History* (Baltimore and London: Johns Hopkins Press, 1923, 1969), p. 28.

4. Max Farrand, *The Records of the Federal Convention of 1787*, vol. 2 (New Haven: Yale University Press), p. 35.

5. Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn.: Weslevan University Press), p. 471.

6. Alexis de Tocqueville, *Democracy in America*, vol. 2, trans. George Lawrence and ed. J.P.Mayer (Garden City, N.Y.: Anchor Books, 1969), p. 121.

7. Farrand, vol. 1, p. 112.

8. Farrand, vol. 1, p. 113. Cf. the statement of Charles Pinckney of South Carolina (vol. 1, pp. 64-65).

9. Ibid., p. 289, emphasis added.

10. Cooke, p. 474.

11. Ibid., p. 475.

12. Ibid., p. 476.

13. Ibid., p. 500.

14. de Tocqueville, p. 121.

15. In the *Federalist*, No. 10, Madison defines a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Cooke, pp. 60-61.

16. Farrand, vol. 2, p. 52.
17. de Tocqueville, p. 122.
18. Cooke, p. 483.
19. Ibid.
20. Ibid., p. 349.
21. Ibid., p. 159.
22. Ibid.
23. Ibid., pp. 464-65.
24. John Marshall, *The Life of George Washington*, vol. 5 of 5 vols. (Fredericksburg, Va.: The Citizens' Guild of Washington's Boyhood Home, 1926), p. 204.
25. McCulloch v. Maryland, 4 Wheaton 316 (1819).
26. Ibid.
27. Cooke, p. 147, emphasis in the original.
28. Ibid., p. 150, emphasis in the original.
29. United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936).
30. Marbury v. Madison, 1 Cranch 137 (1803).
31. United States v. Maurice et al., 2 Brockenbrough 109 (1823).
32. John Locke, "The Second Treatise," chap. XIV, sect. 159, in *The Two Treatises of Government*, ed. Peter Laslett (New York: New American Library, 1965). Locke distinguishes "federative power," extraordinary action in the realm of external affairs, from "prerogative power" itself. This essay will use the term *prerogative power* as a general term.
33. A.V. Dicey, *Introduction to the Study of Law of the Constitution*, 8th edition (London: Macmillan, 1920), p. 420.
34. William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, vol. 1 (Chicago: University of Chicago Press, 1979), pp. 242-43.
35. Dicey, p. 61.
36. Cooke, pp. 160-61.
37. Thomas Babington Macaulay, *The History of England*, vol. 1 (New York: Hurd and Houghton, 1874), pp. 32-34.
38. Dicey, p. 421.
39. Cooke, p. 524.
40. *The Works of James Wilson*, vol. 2, ed. Robert Green McCloskey (Cambridge, Mass., 1967), p. 730.
41. Farrand, vol. 1, pp. 65-66.

PRESIDENTIAL TRANSITIONS AND NATIONAL SECURITY ISSUES

By JAMES P. PFIFFNER
George Mason University

Every new Administration feels it has a mandate for new foreign policy...

—Zbigniew Brzezinski

ON 20 JANUARY 1981, HAMILTON JORDAN WAS ABOARD Air Force One at Andrews Airfield while Ronald Reagan was being sworn in as President of the United States. For the past year Jordan had been handling the negotiations with Iran for the US hostages, who were about to be released. Shortly after noon, he called the White House situation room to ask the status of the hostages. He was informed that because Jimmy Carter was no longer President he was not cleared to receive that information.[1]

This vignette illustrates the suddenness with which Presidential power in the United States is shifted. In an important sense, the perceived transition of power, if not authority, extends back in time to the November election. If the incumbent is not reelected his influence begins to wane as foreign governments realize that the President cannot commit the US Government beyond 20 January and the permanent bureaucracy slips into neutral gear as it awaits new direction. The incoming President must choose a White House staff, appoint a cabinet, select political appointees to run the executive branch, get control of the bureaucracy, formulate a budget, and push his own legislative agenda.[2]

The paradox of each Presidential transition is the need to move the government in the direction promised in the campaign and yet assure continuity. The leadership may change, but the government of the United States remains. It must honor its previous commitments and pursue its interests with constancy. These issues are most acute when control of the Presidency changes parties, as it has five times since World War II.

Policy

In every election since 1944, the incumbent President has briefed Presidential candidates on national security issues soon after the nominating conventions. Outgoing and incoming Presidents take pains to make it publicly clear that the full power of the Presidency rests with the incumbent, and sometimes efforts also are made to convey agreement between the old and new administrations. An example of the rhetoric and dangers of this is the 1968-69 transition from Johnson to Nixon. After the 11 November meeting between Johnson and Nixon they held a news conference to assure US allies and enemies and the American people that US foreign policy would be constant. Nixon stated, "I gave assurance ... to the Secretary of State, and, of course, to the President, that they could speak not just for this Administration but for the Nation, and that means for the next Administration as well." The Johnson administration was pleased, but Nixon soon had second thoughts about giving the administration what might have appeared to be a blank check. He soon amended his statement by saying that he would expect to be consulted on any major decisions. This was clearly unacceptable to Johnson, who said, "... I will make whatever decisions the President of the United States is called on to make between now and January 20th."[3]

When newly elected Presidents make the difficult change from campaigning to governing, they are filled with optimism and what Henry Kissinger called "charmed innocence." When a new administration has

replaced the incumbent, it feels it has nothing to learn from the outgoing administration. According to Dan Fenn who was a personnel recruiter for President Kennedy, "We were a little bit hubristic—our impression was that there wasn't an awful lot that they could do for us that we couldn't do for ourselves ... To us, at least, it was perfectly clear that presidents over two hundred years of American history had screwed everything up. The last thing we wanted to do was to pay the least bit of attention to the terrible Eisenhower administration."[4] Alexander Haig makes a similar point: "[the tendency is for a new administration] to believe that history began on its Inauguration Day, and its predecessor was totally wrong about everything, and that all its acts must therefore be cancelled."[5]

For these reasons, Richard Neustadt counsels new Presidents to move slowly: "Transitions are not forever, ignorance wears off ... Ignorance of men, role, institution, policies—and nuances will wear away."[6] But new administrations are understandably impatient to move quickly to implement their policies and push their agendas. This impatience is underscored by the conviction that the greatest window of opportunity for change is a narrow one and it is necessary to take advantage of it. According to H. R. Haldeman, "You've got the power now, don't listen to anyone else. Your power is going to start eroding from January 20th on."[7]

The classic case of a transition blunder was the Bay of Pigs invasion by the Kennedy administration three months after it took office. Planning for the operation had begun the previous March by the Eisenhower administration, and Kennedy was briefed after the election. Although Kennedy began with some skepticism, he felt pressure to approve the operation soon for a number of political and military reasons. The CIA was confident of success, and the Joint Chiefs of Staff did not demur from the CIA plans. One aggravating factor was Kennedy's campaign statements about being tough on Cuba. Calling off the Cuba plans after his campaign criticisms might

have left Kennedy open to charges that he was pulling back from his promises. Kennedy gave his final approval to go forward, but the operation was significantly changed from original plans. He insisted that US forces not take part in the operation so as to preserve plausible deniability of US involvement.

When the operation failed miserably, Kennedy asked, "How could I have been so stupid?" In retrospect he had not examined closely enough the changes that had been made in the plan or the apparent confidence of the Joint Chiefs in the CIA plan. It also appears that the CIA did not take seriously Kennedy's insistence that there be no direct US military involvement. According to Allen Dulles, "We felt that when the chips were down—when the crisis arose in reality, any action required for success would be authorized rather than permit the enterprise to fail."[8]

Part of the problem was that the administration was new to the job and the people were new to each other. "I think it is fair to say," recalled McGeorge Bundy, "that we all met each other at the entranceway ten days before inauguration."[9] They did not yet have the confidence to challenge each other or the rest of the Government agencies as was done effectively during the Cuban missile crisis in 1962. "In this Bay of Pigs affair the new regime's decision-making showed two striking features, ignorance and hopefulness. The ignorance was tinged with innocence, the hopefulness with arrogance."[10]

This case raises the broader issue of ongoing covert plans and operations. Should a new President be informed of all ongoing plans and be asked explicitly for his approval for continuation? Another problem comes up when informal and nonrecorded agreements are made with foreign governments. For instance, according to William Bundy, after the 1956 Suez war, Secretary Dulles assured Israel in a letter that the United States would react to assure the freedom of navigation in the Gulf of Aqaba if it were threatened. This commitment was not conveyed to the new administration in 1961.

When such a threat occurred in 1967 the Johnson administration was embarrassed when presented by the government of Israel with the letter of which it had no previous knowledge.[11]

There has also been some question about the informal agreements and assurances between the United States and the USSR resulting from the 1962 Cuban missile crisis. These have reportedly been kept over the years in loose-leaf binders in White House safes, rather than formally recorded in any systematic way readily available to new administrations. This lack of a complete, formal record may have been in part responsible for the 1979 controversy about a Soviet combat brigade in Cuba.

President Nixon campaigned for the Presidency promising to bring an honorable end to the war in Vietnam, hoping to emulate President Eisenhower's achievement in Korea. After the 1968 elections, when the peace negotiations in Paris had been deadlocked for several months over the inability to agree on the legitimate parties to the negotiations, the Nixon camp sent a signal to South Vietnam that encouraged it to accept a compromise, blurring the issue of who was party to the talks. The South had been stalling with hopes of getting a better settlement when the Nixon administration came to office. This allowed the Johnson administration to leave office with the negotiations underway. But Henry Kissinger considered this a mistake because it set the stage for deadlock on more substantive negotiations and left the new administration vulnerable to charges of inflexibility.[12]

On other issues the incoming administration was influential in affecting the policies of the outgoing administration. In its last months in office, the Johnson administration had been seeking a summit with the Soviets, but Nixon and Kissinger moved to head it off by communicating through non-official channels that the incoming administration was against it.[13]

The Reagan administration came to office after a campaign that was very critical of President Carter for

being too soft on the Soviet Union and for letting the United States be a victim of revolutionary Iran which held the US hostages. Thus, President-elect Reagan refused to be briefed on the hostage situation so as not to appear to be implicated in the Carter policies and to be free to criticize the administration. It was not until war broke out between Iran and Iraq that Reagan agreed to be briefed by the Government.

With the negotiations dragging on into the last days of the Carter administration, the Reagan team made a statement that indicated that negotiations would be tougher after the new administration took office, encouraging Iran to settle with the Carter administration. On January 18, Reagan agreed to go along with the package that the Carter administration had negotiated with the Iranian militants. The hostages were released shortly after Reagan's inauguration. Later there was some doubt that the administration would honor the agreement negotiated by the previous administration because the new administration did not want to be a party to negotiations with terrorists. It was only after strong arguments by Secretary of State Haig that the President was convinced that the credibility of the US Government and our cooperating allies was at stake was it decided that the agreement would be honored by the United States.[14]

As much as the new administrations want to move out in new and bold directions and distinguish themselves from their predecessors, the reality is that continuity with past policy is the norm.[15] Zbigniew Brzezinski writes in his memoirs, "Every new Administration feels it has a mandate for new foreign policy ... the new men soon discover that the problems they face are more intractable and lasting than they had expected—and the virtues of continuity come to be appreciated more than the merits of innovation. Proud claims of originality quietly give way to statesmanlike appeals for bipartisanship on behalf of the enduring national interest."[16]

Process

In addition to moving to change policy to distinguish himself from his predecessors and move on his own agenda, indeed to be able to do this, a new President must take control of the government. White House structures and processes must be established first because the White House staff and advisory system must be ready to act immediately. The decisionmaking system must be set up or each decision will be approached on an ad hoc basis. This can be particularly dangerous in the national security area.

The pendulum of White House organization has oscillated between the formal and the less formal in the modern Presidency within the underlying trend of increasing White House control. Presidents trying to distinguish themselves from their predecessors have often overreacted in their organizational decisions.

With President Eisenhower's wide experience in military and foreign affairs, he was able to dominate national security decisionmaking. He set up an NSC system with a formal hierarchical structure, and met with the NSC weekly for his first two years in office. While Eisenhower made all major foreign policy decisions, he supported John Foster Dulles in the running of the State Department and US foreign policy.

When John Kennedy came to office, he moved quickly to establish stylistic and organizational differences between himself and President Eisenhower. He dismantled Eisenhower's elaborate NSC machinery and staff system and came to rely increasingly on McGeorge Bundy as his national security advisor. The Kennedy administration also marked the beginning of the rise of the national security advisor to predominance in foreign and national security policy.

Richard Nixon came to office determined to remedy the personalized and informal approach that Kennedy took to the office. He wanted to strike a midpoint between the formality of the Eisenhower administration and the informality of Kennedy. While Nixon initially

intended to delegate domestic policy to his cabinet, he intended to run foreign policy from the White House. "I've always thought this country could run itself domestically without a President. All you need is a competent cabinet to run the country at home. You need a President for foreign policy; no Secretary of State is really important; the President makes foreign policy."[17]

Henry Kissinger was Nixon's National Security Advisor while William Rogers played a secondary role at the State Department. Nixon had talked about restoring the National Security Council to the preeminent position it had in the Eisenhower administration. Kissinger articulated the reason for establishing a regularized machinery for national security policy and his criticisms of the Kennedy approach: "There exists no regular staff procedure for arriving at decisions; instead *ad hoc* groups are formed as the need arises. No staff agency to monitor the carrying out of decisions is available. There is no focal point for long-range planning on an inter-agency basis. Without a central administrative focus, foreign policy turns into a series of unrelated decisions—crisis-oriented, *ad hoc* and after-the-fact in nature. We become the prisoners of events."[18]

Kissinger began to organize the national security policy making machinery before inauguration through National Security Decision Memorandum 2 which established the primacy of the National Security Advisor—and the secondary position of the State Department—by abolishing the Senior Interdepartmental Group that State had dominated. The document was signed by Nixon and issued immediately after his inauguration.

Nixon decided to draw making foreign policy into the White House because he wanted to dominate it—and also because he distrusted the bureaucracy. He believed the State Department was too tied to the status quo, too much a part of the eastern establishment, and too slow to respond. He also believed White House advisers had only one client, the President, and should respond immediately and focus exclusively on Presidential priorities.

Besides this formal avoidance, the White House also began to use back-channels to circumvent the State Department.[19]

Jimmy Carter came to office after a campaign in which he was critical of the isolation of the Nixon White House. Carter promised a return to Cabinet government. "I believe in Cabinet administration of our government. There will never be an instance while I am President when the members of the White House staff dominate or act in a superior position to the members of our Cabinet."[20]

Carter recruited Cyrus Vance to be his Secretary of State and assured him that he would be his principal spokesman on foreign policy and that he would have direct access to the President without having his views filtered through a national security advisor. While Carter may have intended this, his choice of Zbigniew Brzezinski to be his National Security Advisor made it virtually impossible, and Carter's later decisions supported Brzezinski's interpretation of his role.

Brzezinski established his dominance in "NSC-2," signed by the President on January 19, putting the National Security Advisor in charge of key interdepartmental committees, over the objection of Cyrus Vance. Brzezinski saw himself not as a neutral broker but as an advocate for his own perspective. "Coordination is predominance. I learned that lesson quickly. And the key to asserting effective coordination was the right of direct access to the President, in writing, by telephone, or simply by walking into his office. I was one of three Assistants who had such direct access at any time, not subject to anyone's control."[21]

Ronald Reagan's first term White House was dominated by the triumvirate of Michael Deaver, Edwin Meese, and James Baker, each playing a particular role and performing a certain function. When Reagan took office he promised to make the Secretary of State his primary spokesman for foreign policy. In line with this, he appointed Richard Allen to be his national security

advisor who took a low visibility approach to the role, in sharp contrast to his predecessors. Allen reported to the President through Edwin Meese.

When Alexander Haig was designated Secretary of State he resolved to be the President's "vicar" in foreign policy. Before January 20 he negotiated with his cabinet colleagues an initial Presidential memorandum, NSDD 1, to establish his primary position and set up a foreign and national security decisionmaking process. His intention was to establish his primary role early, before bureaucratic rivals would have a chance to resist his ploy. Shortly after the inauguration, he gave the document to Edwin Meese, who put it in his briefcase. It never came out.

Haig felt that the early memorandum establishing the process "was the fundamental organizational reason why Kissinger, and not Bill Rogers, was the dominant figure in foreign policy during the Nixon and Ford administrations."[22] But the fundamental reason Kissinger dominated making foreign policy in the Nixon and Ford years was that he had the confidence of a President who wanted it run that way. With that confidence a basic memorandum, establishing a process for policy making, is a powerful weapon; without it, it is merely a piece of paper. But Haig was never to achieve his hoped for status as vicar because he was not trusted by the White House and was not seen as a team player. In addition, he reported to the President through Meese, as did Allen. Haig did not have regular contact with Reagan, and when he wrote a memo to the President asking for a one-hour meeting each week, he received no reply.[23] He resubmitted his draft of NSDD 1 on February 5 but still got no response.

As a result of the weak initial status that President Reagan gave to his National Security Advisor and his unwillingness to vest confidence in his Secretary of State, it was not clear who, short of the President, ran foreign policy in the early Reagan administration.

Ironically, after Reagan appointed George Shultz, in whom he did have confidence, the Iran-contra initiatives

by the National Security Council staff undercut the Secretary of State, leaving him out of the loop in major areas of US foreign policy. The administration that began its term with a National Security Advisor clearly subordinate to the Secretary of State and with broad declarations of Cabinet government ended up with unprecedented operations being run by the NSC staff against the advice of the Secretaries of State and Defense.

The trend in the development of the NSC has been from what began as a link to the permanent government and a coordinating mechanism to an organization that could exclude the official foreign policy-making apparatus. Whatever the appropriate role of the National Security Advisor versus the Secretaries of State and Defense, basic procedures must be established. Aside from arguments over what balance should be struck between the National Security Advisor and the Secretaries of State and Defense, the Unites States does not have the luxury of shaking down a new administration *before these decisions are made.* They must be made before inauguration.

Personnel

One of the most powerful tools that a new President has to use in taking over the government is the right to make personnel appointments to the executive branch. But the selection process is also one of the most frustrating tasks of a new administration. There seems to be no good way to do the job. After the election, the new President-elect is flooded with applications and recommendations for appointments. Selecting appointees from among these many applicants does not solve the problem; as President Taft said, "every time I make an appointment I create nine enemies and one ingrate."

POLITICAL APPOINTEES. New administrations cannot afford to merely sift through everything that comes in "over the transom." If the best and the brightest are to be found, the administration must have an active recruitment program. The problem is that it takes time to

organize such an effort, and the designations and appointments must be made immediately, in the first weeks and months of the administration.

Over the past few decades, Presidential recruitment efforts have become much more elaborate and professional. The recruiting that Dan Fenn was doing for John Kennedy with three people was being done for President Reagan by Pendleton James with 100 assistants. Now there are more political appointees; they reach further down into the bureaucracy; and the White House has a greater voice in making appointments that were traditionally done at the departmental level.

Along with the increasing number of appointees that must be handled by the White House Personnel Office have come increasing delays in bringing officials on board. In recent administrations, the White House has been taking a longer time to select its nominees. The proportion of the top 20 positions in the State Department designated by the President by January 20 has dropped from 55 percent in 1961 to 20 percent in 1981, and of President Reagan's 11 Assistant Secretaries of State, only 1 was in office on May 1, 1981. In filling the top 11 positions at Defense, the proportion has dropped from 91 percent in 1961 to 18 percent in 1981.[24] The time taken from nomination to confirmation has also lengthened. The average number of weeks taken to confirm has increased from 7 weeks in the Johnson administration to 14 weeks in the Reagan administration.[25]

The causes of these increasing delays are many. There are more political appointees now, so it takes longer to make selections. More decisions are made in the White House itself and the White House Personnel Office is much busier. The Reagan administration also screened its candidates more carefully than had its predecessors. The FBI field investigation takes time for security clearances and is often blamed for delays in the appointments process, but the delays caused by the FBI are often exaggerated and used as an excuse when there are other reasons for the delays.

Given the increased burden on the White House Personnel Office in recent administrations and the evident need to get people on board so that the government can begin with the new President's agenda, what can be done? Candidates should begin immediately after the nomination to designate members of their staff to think about personnel appointments. The political dangers of this delicate task are evident. As John Kennedy observed, the last candidate to designate his Cabinet before the election was "President Dewey."

But an early start is essential, and it can be done by a small staff that can put together a pool of candidates arranged into tiers. The operation must be discrete, and it should concentrate at the sub-Cabinet level. One of the key issues that each new administration must decide on quickly is who will have the authority to make appointments to the sub-Cabinet. In the 1950s and 1960s, these appointments, with some exceptions, were decided upon by new department Secretaries in putting together their management teams, even though the appointments were legally Presidential appointments. Presidents Nixon and Carter each delegated much of sub-Cabinet selection to their Cabinet members and came to regret it. They felt appointees were loyal to the Secretaries and not to the White House.

The White House staff feels that the President ought to be able to designate the appointments for his administration, but department heads believe that if they are to be held responsible for managing their departments they ought to have a say in putting together their own management teams. Frank Carlucci, with career and political appointments in several administrations, put it succinctly: "Spend most of your time at the outset focusing on the personnel system. Get your appointees in place, have your own personnel because the first clash you will have is with the White House personnel office. And I don't care whether it is a Republican or a Democrat. If you don't get your own people in place, you are going to end up being a one-armed paper hanger."[26]

The Reagan administration decided to control all political appointees, whether Presidential or agency head appointments, directly from the White House. It ran the most systematic and elaborate personnel operation of any administration in history. In doing so, its definition of loyalty was narrowly interpreted and excluded Republicans who had worked for the Nixon and Ford administrations as "retreads."

This tension between the White House staff and the Cabinet members over sub-Cabinet appointments is inevitable, and there is no "right way" to do it, but cooperation and coordination are essential, and the ground rules must be established early.

CAREER EXECUTIVES The tendency of all new administrations is to be suspicious of the members of the career bureaucracy who run the executive branch. In the foreign policy area, the Department of State has been particularly maligned by new Presidents for being too committed to the status quo to fully support any changes in policy. Suspicion was virulent in the Eisenhower, Nixon, and Reagan administrations. With the breakdown of the post World War II consensus on US foreign policy and the polarization of policy positions, the problem has become worse and has spilled over to affect the DOD and CIA as well.

During the 1981 transition at the CIA, the approach of one of the leaders of the transition team amounted to "firing every officer above GS-14."[27] David Newsom recalls that during the Reagan transition, the suspicion of the State Department was so great that the transition team let it be known no person holding a Presidential appointment from President Carter was to be at his or her desk on January 21, 1981. The new administration did not realize that many of the Presidential appointments at the Assistant Secretary level in the State Department were held by career foreign service officers and that the Department would be significantly hampered in carrying out its duties if these career professionals left

their duties and were not replaced until the administration made its nominations and got them through the Senate. Alexander Haig had to go to the White House to ask for exceptions to the general rule for the State Department, and the White House agreed to most of the career officials staying in their positions until new appointments were made.

David Newsom further illustrates the problem of delays in appointments with the issue of technology transfer to Poland in the early days of the Reagan administration. The problem was that there was no one in the Defense Department who had sufficient knowledge of the issue to represent the DOD perspective at an interagency meeting. The Defense Department was forced to hire back by contract an official from a former administration to sit in on the meetings so that the DOD perspective could be presented at the interagency meeting.[28]

Despite these early misgivings about the career services, there is a clearly predictable "cycle of accommodation" that takes place after political appointees have worked together with career professionals for a time. They soon come to realize that the government cannot be run without expertise, that their institutional memories can be invaluable, and that they are quite responsive to political leadership. According to Elliot Richardson, "I did find them easy to work with. I did find them competent ... they saw their own roles in a manner that virtually required political leadership ... many presidential appointees make the gross mistake of not sufficiently respecting the people they are dealing with and get themselves into trouble as a result."[29]

The sooner a new administration realizes that the career services are there to help them, the sooner they will be able to get on with the agenda of the President. The White House must realize that resistance to its policies within its administration will more likely come from its own appointees than from career bureaucrats. Bureaucrat bashing and the casting of aspersions upon

the loyalty of the career services in the foreign affairs area drains morale and makes more difficult the transition to a new administration.

Conclusion

What lessons have been learned from contemporary Presidencies about the transition to a new administration? There are a number, all having to do in one way or another with the preservation of continuity within the necessity of change. It is entirely appropriate for a new administration to pursue changes in the direction of US foreign and national security policy. But there ought to be an understanding that the broad contours of US national interests are shaped by relatively constant forces and relations with our allies and adversaries. The rhetoric of sharp change can do damage to our international credibility. In seeking to move out in bold new directions, new administrations should be mindful of the need for constancy with our friends and foes.

Continuity with respect to process is also important. One aspect of this is the need for more complete official records of formal agreements and informal understandings between the United States and foreign governments. This problem has been cited by several studies which have, among other things, urged changes in the Federal Records Act of 1950 and the Presidential Records Act of 1978.[30] But more important than legal mandates is the realization that it is in the ongoing interest of the United States to have complete records of agreements and negotiations for future administrations to review and study.

Continuity of process should also include the use of the professional capacities of the Departments of State, Defense, and the CIA in foreign, military, and covert operations, reserving the role of the National Security Council staff to that of policy integration and coordination rather than operational or "off-the-books" projects. These principles, to be effective, must be established early in any new administration.

Discontinuity of personnel is expected at the top political levels of the government with any change of President. But the pendulum has swung a considerable distance from the 1950s and 1960s. We now have more political appointees, and they are appointed by Presidents at lower levels in the bureaucracy. A modest reversal of the swing of the pendulum is in order. This calls for forbearance on the part of the new administrations, but the payoffs are potentially large in terms of institutional memory and "steady-state" control of the government.[31]

Continuity can also be gained by holding over selected appointees from previous administrations for the initial period of a new Presidency, a practice previously common. The experience of the Carter administration keeping on William Hyland in the NSC for six months is instructive. Continuity and institutional memory are built into government career professionals, and advantage should be taken of their experience. While a bipartisan foreign policy may be difficult to achieve, the *nonpartisan* implementation of foreign and national security policy is the *mission* of the career services.

Notes

1. Hamilton Jordan, *Crisis* (New York: Putnam and Sons, 1982), p. 402.

2. For an analysis of what a new President must do to take control of the government, see James P. Pfiffner, *The Strategic Presidents: Hitting the Ground Running* (Chicago: Dorsey Press, 1988).

3. Quoted in Laurin Henry, "Presidential Transitions: The 1968-69 Experience in Perspective," *Public Administration Review*, September/October 1969, p. 471.

4. Quoted in "Recruiting Presidential Appointees," Conference of Presidential Personnel Assistants, 13 December 1984, National Academy of Public Administration, pp. 10, 36.

5. Alexander M. Haig, *Caveat* (New York: Macmillan, 1984), p. 79.

6. Richard E. Neustadt, *Presidential Power* (New York: John Wiley, 1980), p. 231.

7. Author's interview with H. R. Haldeman, Los Angeles, 25 May 1983.

8. Quoted in John Ranelagh, *The Agency: The Rise and Decline of the CIA* (New York: Simon and Schuster, 1987), p. 372.

9. *Papers on Presidential Transitions in Foreign Policy*, vol. II: *Problems and Prospects*, edited by Kenneth W. Thompson (New York: University Press of America, 1986), p. 81.

10. Richard Neustadt, *Presidential Power* (New York: John Wiley, 1980), p. 223. For an account that blames Kennedy for the failure, see Ranelagh, *The Agency*.

11. Thompson, *Problems and Prospects*, p. 22.

12. Henry Kissinger, *White House Years* (Boston: Little, Brown, 1979), p. 53.

13. Ibid., p. 50.

14. Haig, *Caveat*, p. 78.

15. See Frederick C. Mosher et al., *Presidential Transitions and Foreign Affairs* (Baton Rouge: Louisiana University Press, 1987) and Carl Brauer, *Presidential Transitions* (New York: Oxford University Press, 1986).

16. Zbigniew Brzezinski, *Power and Principle* (New York: Farrar, Straus and Giroux, 1983), p. 81.

17. Rowland Evans, Jr., and Robert D. Novak, *Nixon in the White House* (New York: Random House, 1971), p. 11.

18. Kissinger, *White House Years*, p. 39.

19. Ibid., p. 29.

20. Quoted by Dom Bonafede, "Carter White House is Heavy on Functions, Light on Frills," *National Journal*, 16 April 1977, p. 584.

21. Brzezinski, *Power and Principle*, p. 63.

22. Haig, *Caveat*, p. 60.

23. Ibid., pp. 84, 92.

24. "Report of the Miller Center Commission on Presidential Transitions and Foreign Policy," in *Papers on Presidential Transition and Foreign Policy*, vol. I: *History and Current Issues*, p. 95.

25. National Academy of Public Administration, "Leadership in Jeopardy," *Final Report of the Presidential Appointee Project*, November 1985, p. 11.

26. NAPA, "Presidential Appointee Project," transcript of interview conducted by project staff.

27. Quoted in Ranelagh, *The Agency*, p. 659.

28. David Newsom, "Presidential Transitions and the Handling of Foreign Policy Crises: The Iranian Hostage Crisis from Carter to Reagan," in *Papers on Presidential Transitions*, edited by Thompson, vol. II, pp. 129-30.

29. Quoted in James P. Pfiffner, "Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century," *Public Administration Review*, January/February 1987, p. 61.

30. "Strengthening the U.S.-Soviet Communications Process to Reduce the Risks of Misunderstandings and Conflicts," *NAPA*, April 1987.

31. Cary Covington, "Development of Organizational Memory in Presidential Agencies," *Administration and Society*, 17 (August 1985); 17.

CONGRESS, NATIONAL SECURITY, AND THE RISE OF THE "PRESIDENTIAL BRANCH"

By NELSON W. POLSBY
University of California, Berkeley

[In the administration of Franklin Roosevelt,] *There literally was no White House staff of the modern type, with policymaking functions. Two extremely pleasant, unassuming, and efficient men, Steve Early and Marvin McIntyre, handled the president's day-to-day schedule and routine, the donkey-work of his press relations, and such like. There was a secretarial camarilla of highly competent and dedicated ladies who were led by "Missy" LeHand.... There were also lesser figures to handle travel arrangements, the enormous flow of correspondence, and the like. But that was that; and national policy was strictly a problem for the President, his advisors of the moment (who had constant access to the President's office but no office of their own in the White House), and his chosen chiefs of departments and agencies.*

—Joseph Alsop

BY THE TIME OF THE REAGAN ADMINISTRATION, THE White House and its appendages had vastly expanded. In the field of national security policy, for example, *after* the National Security Council was discovered to have undertaken an illegal and deeply embarrassing foreign policy initiative causing a nationally televised joint hearing by two committees of Congress, the Council, under new management, deployed between 62 and 67 professional staff members and successfully fended off an attempt by the Secretary of State to curb the scope of its activities.

"Conflict between the State Department and the White House," said an elaborate analysis in the *New York Times*, "has been a perennial feature of policy-making in every recent Administration."

> In the Carter administration, Secretary of State Cyrus R. Vance and the National Security Advisor, Zbigniew Brzezinski, repeatedly clashed over American policy on the Soviet Union and other issues. Alexander M. Haig, Jr., President Reagan's first choice as Secretary of State, was locked in a bureaucratic war with White House officials.[1]

These two lengthy quotations illustrate a major trend over the last half-century in American Government. They give evidence of what may be the single most important development during this most recent period of American political history, namely the transformation of the American Presidency from a position of leadership of the executive branch to the centerpiece of what can be called a separate and distinct branch of government—the "Presidential branch."

There are still a fair number of observers who remember that in 1937, the President's Committee on Administrative Management—the Brownlow Committee—could announce, with good reason, that "the President needs help." Into the White House described by Joseph Alsop, it was proposed to introduce a half dozen or so special assistants. This small corps, with its "passion for anonymity," would form an Executive Office to help the President do the nation's business. James Fesler quite rightly points out in his analysis of the committee and its effects that the emergence of the Presidential branch is in no sense a fulfillment of the Brownlow Committee's recommendations, but rather a development on a far greater and more ambitious scale than the Committee anticipated, or desired.[2] Moreover, the initial cause of the emergence of this larger development was not the adoption in 1939 of a version of the Brownlow Committee's recommendations, but rather the burgeoning of special agencies responsible to the President as a result of the

demands placed on the national government by World War II.

Responsibilities for the national economy never slipped back completely into the private sector after the war was over, and the Employment Act of 1946 made it clear that Congress wanted things that way.[3] Perhaps the most significant prewar innovation was the transfer in 1939 of the Bureau of the Budget to the Executive Office, but it was not until the Johnson administration that the energetic politicization of that agency began to take shape. Earlier, to be sure, figures other than career civil servants were appointed to the directorship of the Bureau, but that was as far as the political incursions went.[4]

In the realm of foreign and defense matters, the following organizational events occurred at the top of the Government in the immediate postwar era: (1) The establishment of the National Security Council as a permanent Presidential organization. (2) The establishment of the Central Intelligence Agency—an agency growing out of the wartime Office of Strategic Services and responsible directly to the President. (3) The consolidation of the military departments into a single Department of Defense with a Joint Chiefs of Staff and the imposition of a new layer of Presidential appointees above the service secretaries.[5] These three organizational innovations—each significantly changing the way in which national security policy was to be made and conducted, and each shifting responsibilities upward and toward the President personally were the result of a single law, the National Security Act of 1947.

In addition, (4) there were successive purges and consolidations of the foreign service through the loyalty-security programs, Wristonization, and numerous sequels.

Students of public administration are well aware of each of these developments in the decade following the surrender of Japan. It is valuable to contemplate them from the distance that 30-plus years brings, so that we

can appreciate not only the microconsequences in terms of changed public policies (e.g., toward mainland China, or in military procurement) but also in the ways in which these changes in administrative structure and functioning contributed to a grand redesign of American government.

The emergent Presidential branch, as it has developed over the last half-century, is a more or less self-contained and self-sufficient organism that competes—usually quite successfully—with Congress to influence the main activities of the bureaucratic agencies of the permanent government—the executive branch. The Presidential branch consists, in the first place, of the Executive Office of the President, including nine agencies (White House Office, Office of Management and Budget, National Security Council, and so on), a budget of over $100 million, and a full-time staff of perhaps 1,400. It consists also of those Presidential appointees at the top of the executive branch who choose, in the conduct of their responsibilities, to respond primarily to White House leadership rather than to the interest groups served by their agencies or the bureaucratic needs of the agencies themselves. This porous definition is helpful in calling attention to the ragged boundary between the presidency and the executive branch.[7] This Presidential branch is not wholly dependent on the executive branch for expert advice on program formation, and indeed it commonly holds the executive branch at arms length during annual budget negotiations, during episodes of program reduction and cutback, and even during periods of programmatic innovation, especially in foreign affairs (e.g., the opening to China).

Waging Turf War

What role for Congress remains in foreign, defense and national security affairs in a constitutional structure dominated by a juggernaut as formidable as the modern Presidential branch of government? In addressing this matter, we might take inspiration from the British

journalist, Walter Bagehot, who, in his famous mistitled treatise called *The English Constitution*, distinguishes between efficient and dignified instruments of government. He assigns efficiency to Parliament and dignity to the monarch, who had, he says, three rights: to be consulted, to encourage, and to warn.[8]

This mode of analysis has proven attractive to a number of contemporary observers of policy making in present-day America. They assign efficiency to the Presidency and dignity to Congress and complain that Congress is not dignified enough. The problem, they say, is that in foreign affairs, Congress intrudes too much on the President's constitutional turf to the detriment of coherence in policy making, steadiness and reliability in our alliances, and predictability in dealing with adversaries.

Moreover, it is urged, Congress fails to give enough running room to those selfless and uniquely valuable national treasures who formerly were supposed to embody Brownlow's "passion for anonymity" but have not lately done so, the President's assistants. Needless to say, a major source of these complaints is former assistants to the President. Some of them seem to wish to do away with the separation of powers altogether, get rid of Congress and the Presidency both, and adopt a system where the Legislature—if we really must have one—knuckles under to the Chief Executive—let us call this figure the Prime Minister—especially in foreign affairs.[9]

A more careful reading of Bagehot puts a different gloss on what it means to be a dignified branch of government. This is the branch, says Bagehot, that mobilizes, focuses, and instructs public opinion. And more than merely mobilizing the passing opinions of the public, the dignified branch elicits deeper sentiments of loyalty to the political system, and a sense of the legitimacy of the regime—embodying what we, in the United States, might call the consent of the governed.

Obviously, Congress does not carry that full burden in our system. It is a system, after all, of shared powers

and Congress shares with the President the fact that both have immediate access to electorates. They are different electorates, to be sure, but each is every bit as national in its scope as the electorate of the other. By virtue of the President's origins in an election, the Presidency is a dignified as well as an efficient office, just as Congress, through the exercise of its constitutional responsibilities to legislate, to appropriate, and to advise and consent, is efficient as well as dignified. Thus in speaking of three major congressional activities that help to define the role of Congress in foreign affairs, we further illustrate the mixture of dignity—that is, public-regarding activity—and efficiency—that is, activity directed to policy-making and therefore to congressional-Presidential relations—that characterizes the modern Congress.

Congress has the right to publicize. Publicity is a fascinating phenomenon and not merely to practitioners of politics. Max Weber somewhere once said that the essence of political craftsmanship was knowing when to make an issue of something, knowing when to fight. Congress and especially the Senate has the right to set a part of the national agenda through the publicity accorded its investigations, its debates, and the speeches of its Members. The dynamics of agenda setting turn out to be quite complicated. Frequently the power to publicize is not merely a device for communicating between community leaders and followers but actually a device by which one set of national leaders communicates with other sets of leaders also located in Washington by means of statements directed to general publics.

No doubt it is in part a product of the sheer size of the policy-making machinery that exists in the American national government that messages among political leaders are in Washington frequently sent through publication in newspapers of general circulation. It is a method of communication that continuously tests the public acceptability not only of policy alternatives that governments have chosen to pursue and defend, but also of alternatives that may only be proposed or are being

tentatively considered or are internally being contested among agencies of the executive, or the Presidential branch, or between them.[10]

This phenomenon is frequently confusing, and possibly disturbing to foreign observers of our American Government who are used to far more compact, secretive and less extensive policy-making machinery, Moreover, this can be handled in our system for good or ill. For a bad example, we might remember what Senator Joseph McCarthy did in the early 1950s to the career services of the Department of State and the US Information Agency by his misuse of the power to publicize—and we might also remember Dwight Eisenhower's decision to let McCarthy do it.[11]

On the other hand, there is the example of Senate Foreign Relations Committee Chairman J. William Fulbright's decision to hold hearings in early 1968 on the rationale and on the conduct of the war in Vietnam. These hearings played a large part in focusing national attention on the conduct of the war. Secretary of State Dean Rusk was required to come up to Capitol Hill and testify. He was treated courteously but questioned sharply during his 11 hours of testimony spread over two days (March 11 and 12). Others, of different opinions, also testified. The new Secretary of Defense, Clark Clifford, and his deputy, Paul Nitze, declined to testify; Clifford on the grounds that he was still learning his job, Nitze because he had concluded that he could not defend current policy in public. Historian Herbert Y. Schandler comments:

> There is reason to believe that this was the point where Clifford's growing but unresolved doubts crystallized into a firm conviction that our strategy had to turn to that of seeking a peaceful solution Certainly the idea of having to defend this dubious and unsuccessful policy before informed and hostile congressional critics focused his doubts. 'When Clark Clifford had to face up to the possibility that he might have to defend the administration's policy before the Fulbright committee, his views changed,' recalled Nitze.[12]

The Value of the Congressional Partnership

One possible inference from this episode is that in a nation like ours, with its enormous distances and its varied population, where the consent of the governed is so frequently solicited in elections, the management of a decent arena for the criticism and testing of public policy can be of immense value.

There are, secondly, the twin capacities that Congress retains to hasten and to delay. Matters can move swiftly through the stages of congressional approval or they can stall. One thinks of Speaker O'Neill giving President Jimmy Carter the present of a specially created committee that expedited the Carter energy program through the House of Representatives, and then the 13-month delay that followed in the Senate.[13] One thinks of the postponement by so many years of American recognition of the Communist government of China—a delay largely to be accounted for by the distribution of opinions in the US Senate.[14] Likewise, one might think of the dispatch that Arthur Vandenberg urged on President Truman, once Truman, Dean Acheson, and George Marshall convinced him and the rest of the Senate leadership that something like a Truman doctrine was needed to protect the postwar development of Greece and Turkey and conceivably also Italy and France.[15]

Finally, there is the power to incubate. Incubation is a term I use to cover a process that may go on over many years. Essentially, it occurs because Members of Congress, being people who are deeply engaged in public affairs, now and again get ideas about the content or substance of public policy. In the American political system, obtaining agreement on any particular course of action requires a sizable task in coordination. Many items already exist on the public agenda. Different actors have their varied priorities. And so to place any particular innovation on the agenda for action takes time, energy and effort.

More and more US Senators find it useful for the progress of their careers to cultivate interest groups that organize nationally and not merely in their own States.

Publicity, plus the official instruments of Congress—the introduction of bills, the holding of hearings, the making of speeches—all provide opportunities for Senators and, to a lesser extent, members of the House to educate their colleagues, over the long haul, on the merits of proposals. Not every bill that gets introduced is designed for immediate enactment. Sometimes the purpose is to begin to make a record, to put an alternative on the long-term agenda.

> This was, more or less, the way the Nuclear Test Ban Treaty staved alive during the 17 years between its proposal and its enactment. The idea was kept active by a Senator, Hubert Humphrey, who "seized jurisdiction over an emerging issue by means of the establishment of a special subcommittee and then worked hard at keeping the possibility of a solution afloat in the world of policymakers."[16]

The Peace Corps is another example of a foreign policy innovation incubated in Congress.[17]

In general, the fashion is to deplore the involvement of Congress in foreign policy-making and to see such recent congressional initiatives as the War Powers Resolution and the Angola Resolution and the difficult struggles over MX and the Panama Canal Treaty and Salt II as inappropriate exercises of congressional power. But some of the other examples I have mentioned may prompt a different conclusion. In a vast and heterogeneous society, which is dedicated to self-government, we may well need and be fortunate to have a public forum such as the Congress where the varied strands of opinion that arise in a complex nation are woven into public policy so that the outcomes command reasonably broad assent. The results may not be particularly coherent, but they can become something far more important and more difficult to achieve than that—namely, legitimate.

Notes

1. Michael R. Gordon, "At Foreign Policy Helm: Shultz vs. White House," *New York Times*, August 26, 1987.

2. James W. Fesler, "The Brownlow Committee Fifty Years Later," *Public Administration Review* 47 (July-August, 1987), pp. 291-96.

3. Stephen K. Bailey, *Congress Makes a Law* (New York: Columbia University Press, 1950).

4. Allen Schick, "The Budget Bureau That Was: Thoughts on the Rise, Decline and Future of a Presidential Agency," *Law and Contemporary Problems* 35 (Summer, 1970), pp. 519-39.

5. Paul Y. Hammond, *Organizing for Defense* (Princeton: Princeton University Press, 1961) for the story up until the Kennedy administration.

6. For some of the detail, see I. M. Destler, *Presidents, Bureaucrats and Foreign Policy: The Politics of Organizational Reform* (Princeton: Princeton University Press, 1974).

7. The best recent work on this subject is by John Hart, *The Presidential Branch* (New York: Pergamon, 1984); and Hart, "The President and His Staff" in Malcolm Shaw, ed., *The Modern Presidency* (New York: Harper and Row, 1987), pp. 159-205.

8. Walter Bagehot, *The English Constitution* (first published, 1867) (London: Collins, Fontana, 1963), p. 111.

9. A careful and responsible summary of these arguments is continued in James L. Sundquist, *Constitutional Reform* (Washington, DC: Brookings, 1986).

10. David Broder, *Behind the Front Page* (New York: Simon and Schuster, 1987), pp. 209-10; and Nelson W. Polsby, "American Democracy in World Perspective and What to Do About It" in D.K. Adams (ed.), *Studies in U.S. Politics* (Manchester, U.K.: Manchester University Press, 1989), pp. 215-28.

11. Martin Merson, *Private Diary of a Public Servant* (New York: Macmillan, 1955); and Norman Dorsen and John G. Simon, "A Fight on the Wrong Front," *Columbia University Forum* (Fall, 1964), pp. 21-28.

12. Herbert Y. Schandler, *The Unmaking of a President: Lyndon Johnson and Vietnam* (Princeton: Princeton University Press, 1977), p. 215.

13. Congressional Quarterly, *Energy Policy* (Washington, DC: Congressional Quarterly, 1979).

14. *The Reporter*, issues on the China Lobby, April 15 and April 22, 1952.

15. Nelson W. Polsby, *Political Innovation in America* (New Haven: Yale University Press, 1984), pp. 75-91.

16. Polsby, *Political Innovation*, p. 67.

17. Ibid., pp. 91-99.

INSTITUTIONALIZATION, DEINSTITUTIONALIZATION, AND LEADERSHIP

By BERT A. ROCKMAN
University of Pittsburgh and
The Brookings Institution

In our system, Presidents have a great deal of latitude to do as they please in foreign affairs (at least until Congress or public opinion catch up to them) and do not need to feel as constrained by collegial processes as heads of governments in other systems.

HAS FOREIGN POLICY DECISIONMAKING IN THE UNITED States become increasingly deinstitutionalized? This requires us to ask first, what is an institution and what is an institutional mode of behavior? Secondly, we need then to ask what is the relationship between the constitutional and leadership roles of the President and the institutionalization of foreign policy decisionmaking?

It is clear that the American presidency has become an organ of complex characteristics. No other government has quite the organizational apparatus in the office of its central executive as the United States has. In recent times, only the central agencies in Canada and the Bundeskanzleramt in West Germany have been remotely close in their size, complexity, and functional power to the Executive Office of the President. The development of this apparatus is commonly associated with the idea of an *institutional presidency*—institutional in the sense that its offices, organizations, and functions appear to have continuity across Presidencies and that the office is separable from the incumbent.[1] Certainly, much of this is true,

though titles and organizational apparatus can be misleading. Often, there is less than meets the eye.

It is correct to say that the modern White House has organizations and routines and that many of these have continuity across Presidential administrations. However, *institutionalized processes* are not always, or even necessarily, the result. Sometimes White House organizations serve only to centralize decisionmaking and cut it off from broader institutional bases of policy making. Notably, while the facade of institutionalized organization exists, the turnover among individuals in those organizations often is very high across Presidential administrations.

Many White House staff organizations are absolutely essential to the modern Presidency. Other staff units, both small and large, are legislatively inspired and mandated by law—the old Bureau of the Budget (BOB) and its contemporary successor, the Office of Management and Budget (OMB), the Council of Economic Advisers (CEA), and the National Security Council (NSC). Some staff units come and go with the particular interests of particular Presidents. Once a structure has been created, though, there is a chance that the unit, however it is rearranged, will have descendants in some form.

An institutionalized process reflects the following characteristics: (1) Organizations responsible for conducting or developing policy are regularly consulted by central decisionmakers. (2) The process by which these consultations take place is standardized and followed up. (3) The opportunities for any of the players to set policy in the absence of regularized-consultative procedures is severely constrained. Thus, the institutionalization of decisionmaking means the existence of procedural regularity and the channeling of organizational points of view. In Washington, of course, there is no shortage of government organizations pressing their disparate points of view wherever they can find a constituency or an authority to help them. This, undoubtedly, is a function of our political system which encourages political

entrepreneurship and an active form of organizational politics.[2] Unfortunately, it is also the result of the absence of a forum within the executive branch to encourage *collective* consideration of decisions. Unlike European cabinets, the American Cabinet is a collection rather than a collectivity.[3] The resulting diffusion—and confusion—of public voices making American foreign policy becomes, among those Presidents who care, a source of considerable disgruntlement.

The problem of institutionalization, then, is a dual one: finding the means for considered judgment and the basis for coordinated action. Seen from this perspective, Alexander George's essay (1972) on the need for a multiple advocacy system for foreign policy decision making was a plea for the development of institutionalization.[4] Institutionalization necessarily forces an engagement with the apparatus and machinery of government.[5]

Institutionalization sometimes exists when decisions are of only peripheral concern to the White House. Conversely, the key word to describe an institutionalized process is that of *regularity*. From this standpoint, no postwar American President, except Eisenhower, exhibited a keen interest in institutionalization. The values, of course, of an institutionalized process are to give due weight to considered judgments that stem from a variety of organizational sources and to coordinate the decisions that are produced.

In view of the difficulties presented by our system of government in molding together consideration and coordination, the White House has tried to cut through the seeming morass by centralizing without coordinating as in the heady days of the Nixon-Kissinger tandem, or improvising on the basis of broad formulations as was evident in the Reagan approach. Foreign policy decisionmaking, however, encompasses far more than the prerogatives of the White House. It necessitates an acceptance of institutional perspectives and their legitimacy. It assumes, in short, the existence of continuity.

Yet, we have had relative highs and lows in institutionalized processes. Despite differences in decisional style and in the way they joined the apparatus of government, the Truman and Eisenhower presidencies tended toward processes that utilized the *institutional* strengths of the foreign policy apparatus, a condition that appears to have been somewhat revived during the brief Ford presidency and so far in the Bush presidency. During the Truman and Eisenhower presidencies, this utilization may have resulted from a greater consensus on foreign policy at that time than subsequently.[6] The policy apparatus, in addition, was then simpler, and the media less developed and more inhibited.

Presidential Tendencies

Presidents tend to resist the institutionalization of decision processes. This resistance begins with the idea that a President does not sit among colleagues, but stands above subordinates. In our system, the President is a commander and not a reconciler of differing perspectives. No specific institutionalized process of decisionmaking exists that requires his collective consideration. Typically, Cabinet meetings are pro forma and Presidents tend to find processes they are comfortable with and which fit their predispositions and style of operation.

Thus, unlike cabinet government, the American style of governing provides no consistent forum for collective decisionmaking. Indeed, the whole idea of an "energetic executive," as Hamilton had conceived it in *Federalist,* No. 70, was one that required a unitary rather than a collective executive. The system of separated institutions (executive and legislative) sharing power made it virtually impossible for a European style cabinet government to emerge.[7] The position of the President was to direct the executive branch, not broker it. A President has distance—both legal and political—from his cabinet officials. Yet, a President who stands above it all also stands distant from it all.

Moreover, a President's political ascent rarely invites prior Cabinet service. Consequently, he is removed from experience with career officialdom and from the culture of the organizations that officials serve. Therefore, those who occupy the White House normally arrive greatly suspicious of civil servants. From a President's standpoint, even those appointed to direct the executive departments often are seen as being in danger of succumbing to the biases of their organizations and to the civil servants or foreign service officers who are the advocates of their organizational creeds.

Beyond these peculiar features of American government and the natural suspicions that Presidents have for mechanisms that either appear to tie them to the past or to competing views, there are inherent tensions between democratic politics and institutionalized continuity. Politics and government reflect different drives. Politics is about change, and a central part of the process of democratic politics is about electing leaders who represent a desire for change. *Government, however, is about conservation*, preserving the past and adjusting incrementally to change. These very different tendencies often lead politicians to think that career officials (civilian or military) are ultra-cautious, unimaginative, and resistant to innovation. The same tendencies also lead career officials to think that political leaders can be frivolous, incautious, and ill-considered in their proposals. Most of the time, and in most instances, these contradictions ultimately are mutually accommodated and find an acceptable balance between change and continuity. Moreover, this prospect is enhanced when noncareer officials stay in their posts for a reasonable length of time.

Conversely, mutual accommodation is least likely in policy domains that have the shallowest institutionalized past—ones that are expected to change when leadership changes and which are least constrained by the existence of statutory law. Such a domain well describes current national security policy-making. Of course and to a degree, national security policy-making is crisis-inspired.

Moreover, national security policy often can be merely a matter of changing words and signals rather than programs or regulations. As a result, Presidents are more able to take the proverbial bull by the horns. Since Presidents resist being anchored, and since institutionalization represents an anchor, Presidents are not likely to want discretion to slip from their hands.

The Development of Foreign Policy Machinery

After World War II, the reality that America would have to be continuously involved in the world set in. It was a time when American governing institutions were being overhauled and modernized. This was true not just in national security affairs, but also evident in such reforms as the Administrative Procedures Act and the Congressional Reorganization Act. The creation of a modern national-state, inspired by Roosevelt, was spurred by World War II and the Cold War that soon followed. The overhauling of the foreign policy and military machinery was essential if the United States was to exert a continuous rather than episodic influence in world affairs. Whether it was our goal or not, the outcome of World War II bequeathed to the United States the role of international power. Protected east and west by oceans, an isolationist, regional nation now had become a global force in a world suddenly shrunken by the advancement of modern communications, transport, arms, and now, too, political propaganda and organization. The need for some apparatus of information gathering and analysis, of decisionmaking, and implementation was apparent. Thus, the postwar era was a time of organizational reform.

In many respects, the modernization of the American military establishment after the war culminated a process that had originated from the aftermath of the Spanish-American War, when the state militias of the National Guard proved to be something less than a paragon of military efficiency.[8] Indeed, these State-based military forces deeply reflected the porkbarrel and patronage politics of the day.[9]

The development of the Department of Defense and of the Air Force separate branch of Service and the formation of the Joint Chiefs of Staff (JCS), among others, were all developments designed to create a nationally based and more integrated military force. Although great skepticism continues over the integrated capabilities of the US armed forces and the branch rivalries that continue to beset it,[10] there is no doubt that these steps were designed to improve the proficiency of US military forces for the long term.

On the intelligence front, the generation of the Central Intelligence Agency and the National Security Agency resulted from the need to institutionalize intelligence and, in the case of the former, also provide for covert operations. The idea of a director of central intelligence presumably also reflected the need to integrate the various streams and appraisals of information.

And certainly one of the key developments in the National Security Act of 1947, perhaps not so clearly seen at the time, was the mandating of the National Security Council (NSC). One of the apparent purposes behind the development of the NSC was to provide a means for the coordination of policy, since it had become clear that significant decisions cut across a variety of organizations.

Because the subject of national security policy-making is so vast, covering an enormous span of organizations and of functions, it is necessary to focus on the role of the NSC—what it presumably was intended to be, and what it appears to have become. It is, in fact, at a minimum now three things: (1) the formalized decisionmaking and coordinating "board" whose members are specified in the original statute, with some further Presidential additions; (2) the person identified as the national security adviser to the President—figures who, in recent times, range from the publicly visible Henry Kissinger and Zbigniew Brzezinski to career military or civilian bureaucrats such as Robert McFarlane, John Poindexter, or Frank Carlucci; and (3) the professional staff of academic specialists, military officers, intelligence, and

foreign service officers, and other national security officials on secondment.

The Iran-contra affair and the role of the NSC staff in it have commanded headlines, and brought the NSC staff notoriety. From these events, we know that at least in this affair the NSC staff role—definitions (2) and (3) above—in both decisionmaking and operations has been irregular and politically unaccountable. This evolution of the NSC staff role was clearly not intended yet, perhaps, became inevitable once Presidents began to center foreign policy in the White House. The formulation of the NSC was intended to achieve high-level coordination at the top from institutional sources of foreign and national security policy; it was not designed to evade those sources nor to develop an organizational or operational apparatus of its own to replace the institutional sources. The objective was not to banish but to blend institutional sources of policy making. In this case, though, "original intent" has been overridden.

Yet, the emergence of the NSC staff as a Presidential arm, and the assistant to the President for national security affairs as a key (frequently *the* key) foreign policy spokesman and adviser, gives each the status of speaking for the President. Much like the relationship of the Office of Management and Budget (OMB) to the operating departments, the relationship of the NSC staff and the national security assistant to other arms of the foreign and national security apparatus similarly becomes that of a Presidential surrogate to a more recalcitrant, distant, and undisciplined set of agencies. These central units presume to speak for what the President wants. In the case of Admiral Poindexter's incumbency, the prevailing rationale became less what the President said he wanted and more what Admiral Poindexter presumed he would want, had Poindexter solicited his opinion.

Nonetheless, it is unlikely that the NSC or, for that matter, any other element of American national security policy has been self-propelled. The propensities of particular Presidents have led to the growth of executive *centralization* which, in turn, has led to a *deinstitutionalization*

of policy processes. As with executive centralization in other policy domains, the closer the apparatus or its chief is to the Oval Office, the better its chances of access and influence.

Aside from the NSC, Presidents tend to select as heads of other foreign-national security policy organizations those who are compatible or share certain traits. President Carter's selection of Admiral Turner as CIA director reflected not only a personal friendship, but also a common outlook that emphasized the technical side of intelligence gathering while deemphasizing its human elements. They both apparently believed in the inherent disreputableness of covert operations. The late William Casey and President Reagan evidently shared the reverse outlook—trusting principally human intelligence and cloak and dagger operations.

A common result of appointments that *reinforce Presidential tendencies* is that such agency or department heads are not likely to represent *institutional tendencies* to the White House. Indeed, they may well be chosen for their desire to override them. The appointment of Henry Kissinger as Secretary of State, after the departure of William Rogers, formalized his status as primus inter pares among foreign policy-makers in the Nixon-Ford administrations, but it also put into place at the head of the State Department a personality with a widely advertised contempt for bureaucracy and the parochial qualities, as he saw it, of the foreign service. Not always, but most often, Presidential appointees are thought to look good to the White House to the extent that they seem independent of the dominant cultures and policy styles of their departments. Among others, this certainly characterized Robert McNamara's stint at the Pentagon during which time he took on the Services and key congressional committee members in his quest for greater effectiveness and greater centralization of Defense budgeting and operations.

It must be expected that any organization leader or Presidential administration will have distinctive priorities.

The question is not whether this is legitimate or not; democracy, after all, dictates that it is. Rather, the issue becomes who is trusted to help an administration achieve its goals and also whether an administration or its appointees have any interest in absorbing lessons of the past. That is what *institutionalization* provides. But to short-term appointees and, for that matter, Presidents themselves, institutionalization is feared as simply a further impediment to their desires for change.

The past glows with nostalgia, and there is danger in thinking that it was all better then. Despite their markedly different operating styles, however, the Truman and, especially, the Eisenhower Presidencies represented the high-water-mark of foreign policy institutionalization on the American scene. It may be because the modernizing reforms of the national security apparatus occurred during these Presidencies that they were more likely to adhere to the spirit of many of the reforms and less likely to be in a position to conceptualize alternative ways of doing things.

The Truman and Eisenhower Presidencies

It was especially during the Truman administration that most of the organizational reforms were undertaken. Although a lot of this effort derived from the lessons learned and organizational needs stemming from World War II, and from the new American role in the world that followed, some of the new apparatus was possibly motivated by Truman's incumbency of the White House itself. The Eberstadt Report which led to the creation of the National Security Council tended to conceive of the Executive power in foreign policy as a collective one—in Paul Hammond's conclusion, that the NSC could effectively be "a war cabinet which carried a kind of collective responsibility."[11] Such a conception obviously ran counter to Hamilton's desideratum for a strong Executive, namely that it be singular.

While Truman was reluctant to cede, if only by implication, those powers of the Presidency that he

believed were his alone and not to be shared, the NSC, nonetheless, was reasonably active in its coordinating functions. Still, the level of activity (meetings and actions) is not necessarily the best indicator of the way Truman used the NSC. Skeptical as he was of any infringement on the powers he understood to be his, Truman was more inclined to seek advice from whom he wished, when he wished, in whatever setting he desired. The Presidential prerogative of privileged advice was clearly one that Truman guarded jealously.[12]

The NSC, the President's skepticism toward it notwithstanding, had a checkered existence during the Truman administration. During the years of the Korean War, it was actively engaged, especially in the critical first years. At the same time, many NSC meetings became meetings of staff stand-ins—a sign of the key actors' relative indifference to this setting. Truman's advisory system, as is usually the case for Presidents, was mostly ad hoc.

Truman was advantaged by having some truly remarkable talent at hand to render policy advice in foreign affairs. Many of the key Cabinet officials were well regarded both by Truman as well as by their departments. Especially notable in this regard were Acheson and Marshall at State and Lovett in Defense. To a considerable degree, their views represented ones that were palatable to their Departments. Strictly speaking, however, the process of concerting and institutionalizing these perspectives was put only to moderate use because, as with most American Presidents, Truman perceived mechanisms of collective consultation to be a threat to his prerogatives. Still, during the Truman period, the hostility between departments and White House operations was not as apparent as it later would become, especially under the Nixon and Carter administrations.

The Eisenhower presidency marked the apogee of institutionalization in American foreign policy—of collective consideration and commitment. Eisenhower's use of

both the NSC and Cabinet for collective engagement represented a level not matched since. The common criticism, however, was that collective consideration produced least common-denominator results. That remains a fundamental problem. Collective consideration often makes it difficult to bring issues to a head or to engage them forcefully. A natural tendency is to find consensus at a lower level, or one that is sufficiently vague as to be operationally undisturbing. Yet, as March and Olsen have argued,[13] process is more important than outcome in the end. For, in the long run, a process that is institutionalized also may produce behavior and policy that has broad-based support behind it.

The virtue of the *single mind* (Hamilton's unitary executive) lies in the power of concentration and decisive and energetic action. That may be the upside. The downside, however, is that such energies and decisiveness lose their power when decisions are made that cannot develop a basis for sustained support. The weakness of the *collectivity* is indecision and the production of short-run patch jobs and, as in any other sphere of behavior, the potential for logrolling. Difficult problems do not resolve themselves of their own accord, and Presidents faced with a choice between sharing their decisional authority or plowing ahead on their own, understandably, do not look for further reasons to be frustrated. Practical adjustments and learning, however, are important elements of any decisionmaking process, and they may have greater prospects of being induced through processes of collective consideration.

The Kennedy Style

In the Presidential campaign of 1960, John F. Kennedy presented himself less as Nixon's opposite than as Eisenhower's. Whereas the Eisenhower style was depicted as cautious, conservative, formal, and unimaginative, Kennedy presented himself as a man of action, decisive and, above all, informal. The Eisenhower interest in organization, staffing, and delegation was held up to

ridicule. In this regard, Neustadt was Kennedy's teacher. The lessons of *Presidential Power* and its emphasis on the highly interventionist Presidency appeared to fit well with Kennedy's own predilections.[14]

Kennedy's preferences for dealing with small groups, and even one-on-one discussions, fit the Neustadt model well. According to Garry Wills, Kennedy believed that the elaborate organizational forms that Eisenhower preferred were biased toward inertia, and that little innovation could be developed through them.[15] Thus, organizational form became more fluid and *ad hoc* during the Kennedy Presidency. Kennedy was more comfortable catching advice on the run.

Ironically, the EXCOM structure established during the Cuban Missile Crisis represented an effective base for *advisory* discussions and for coordinating responses. The combination of formal organizationally based advisers and informal non-organizationally based ones appears to have been an effective instrument. By definition, however, such a group was ad hoc, though the basis for developing such collective procedures could well be institutionalized.

Although the Johnson period must be divided into policy theaters, many of the same tendencies that characterized the Kennedy conduct of foreign policy from a procedural standpoint also were applicable to Johnson. Fluidity and ad hoc procedures were prevalent. After the engagement of American military forces in Vietnam, however, a kind of informal war cabinet developed over a midweek luncheon. But the premises upon which the war was being conducted remained remarkably obscure, which made it increasingly difficult, especially for military leaders, to define the instruments necessary for carrying out the American involvement.

Nonetheless, as during the Truman years, if organizational forms were not so greatly relied on, Cabinet officers continued to be listened to—at least until McNamara himself turned against continued escalation of force in Vietnam. Nonetheless, in both administrations, a new and more visible source of influence was

coming into being from within the White House, that being the special assistant for national security—McGeorge Bundy and later Walt Rostow.

The Nixon-Carter Years

Nixon's distrust of the formal bureaucracy was clear from the beginning. To engage bold designs, Nixon was convinced that these had to originate from within the White House. The architect was Henry Kissinger, the new national security adviser. Kissinger and Nixon shared similar suspicions of the competence of bureaucratic organizations and the ability of the leaders of the departments to escape the culture of their organizations. Moreover, both Nixon and Kissinger designed a system in which many central decisions were to be made from the White House with a minimum of bureaucratic involvement. To enhance White House capabilities, Kissinger transformed the NSC staff from a small brokerage outfit to a large shop of glittering minds. The Nixon-Kissinger partnership brought *deinstitutionalization* to a high tide from which it has but barely receded. Its virtues clearly were boldness and decisiveness; its deficiencies included disregard of allied leaders who were frequently not consulted and caught by surprise. In *process* terms, the deficiencies were two-fold: first, they reflected an attitude toward constitutional procedures that was cavalier at best; secondly, they eroded further the standing of the normal foreign policy apparatus and contributed enormously to deinstitutionalization.

Although President Carter's game plan for foreign policy decision making was initially different from Nixon's, in the end it wound up looking similar. Unlike William Rogers, however, Cyrus Vance did not go quietly into the night.

President Carter apparently wanted some type of multiple-advocacy advisory system. What he actually got was a form of multiple ad hocracy, and, in such a situation, the adviser closest to the President's ear is advantaged. Among his two major foreign policy advisers,

Vance and Brzezinski, Carter was some of each but not a blend of either.

As it had been under Kissinger, the NSC staff was sizable and of star quality. It is clear from Brzezinski's memoirs that his conception of his role was of being the President's primary foreign policy adviser and conceptualizer.[16] The Secretary of State, as Carter saw it, should be a faithful implementor of conceptions emerging from the White House. As with Kissinger, Brzezinski's conception of how foreign policy advice should be rendered was that of a virtuoso performance rather than an orchestration. Such a view frequently was put forth by Brzezinski before the press when tensions between Vance and him heated up. Brzezinski's claim was that the system that provided him such an influential role in the process was the system the President preferred.

There is no reason to believe that Brzezinski's conception was erroneous. Carter's staff held views of the State Department much like Nixon's stereotypical view of the State Department and of its spokesmen, such as Secretaries Vance or Rogers—as being better at conveying the demands of other governments to the United States than at articulating American policy toward the world.[17]

Moreover, Carter's own conception of his role as President apparently was that of a solitary figure imbibing information, analyzing it, and rendering rational judgment. Carter's organizational problems in the White House were legendary. Yet, they derived from his style of operation. The "spokes-in-the-wheel" theory of organization (or non-organization as it may rightly be thought) implies that everything will center on the President[18] and that somehow implementation either will take care of itself or that the President, like F.D.R. and Johnson, will intrude deeply, if unpredictably, into implementation processes. Carter's conception of the Presidential role became that of grand decisionmaker. The operational chaos that frequently ensued was partly a function of the funneling of so much decisionmaking into the Oval Office.

Hence, the Carter foreign policy apparatus reflected a set of highly visible soloists often singing in different keys and frequently singing different songs. Brzezinski, Vance, and Young give some idea of the range. In short, Carter lacked any clear schema for the organization of foreign policy. In this context, Brzezinski's role as the driving force behind US foreign policy in the latter stages of the Carter Presidency grew because Brzezinski was advantaged by three factors: proximity to the President, the absence of organizational bindings, and a flow of events in international affairs that played increasingly into Brzezinski's view of the world.

The Machinery Under Reagan

There were several contradictory features to the way the Reagan Presidency approached the foreign policy-making machinery. In the first place, the President desired organizations for high-level coordination in both domestic and foreign policy—Cabinet councils for inter-agency coordination. Within the NSC, inter-agency working groups were active. Reagan's penchant for delegation and consensual management of policy meant, initially, a reduction in the role of the national security adviser. Mostly, Reagan desired policy to be worked out through ordinary channels. This form of policy management clearly fit well with Reagan's decision style, which was to avoid concentrating discussions in the White House itself.

Despite the relatively strong ideological accord at the top of the Reagan administration (in vivid contrast to the Carter administration) the limits of ideology rapidly became apparent in the face of operational choices. Not only did discord follow in the absence of Presidential intervention, but at times it was fueled by poor interpersonal chemistry. The President's lack of involvement provided strong incentives to carry on policy debates, publicly adding to the appearance of an administration that was harmonious in its premises and rife with dissension in its operations.

In spite of a formally diminished role for the national security adviser and the NSC staff, the conflicting signals given off by the major policy actors inevitably moved the national security adviser directly into the fray as an advocate, though never a preeminent one. Indeed, the turnover in national security advisers was stunning during the Reagan years. Six appeared on the scene. Poindexter's case (and, to a degree, McFarlane's) show that relative anonymity is no guarantee of regularized procedures. Above all, it reveals that the national security adviser's role and the NSC staff apparatus itself lend themselves to operations outside the purview of other organizational actors. We do not know what Reagan's role in this had been or that of William Casey, whose alleged support for the Iran-contra operation may well have fallen outside of his organizational position. If the President signed off on the operation fully aware of the import of his actions, that presents a serious problem. If, however, the President was either unaware of Casey's actions or was never adequately informed (as Poindexter has asserted), the problem is even larger—and is an especially unfortunate example. It is an especially unfortunate example of what results when the process of policy formulation ignores institutional sources and regularized processes.

What is particularly clear, not merely of the Reagan Presidency, is that the NSC is not an *institution* in any true meaning of the term. Across Presidential administrations, staff turnover through recent transitions has verged toward 100 percent—and finally arrived at that figure in the transition to the Reagan Presidency.[19] Moreover, unlike the Departments, NSC papers are Presidential ones, thus privileged and therefore not always available to successor administrations. To the extent that the Presidential adviser for national security affairs and the NSC staff play a larger role in formulating and carrying out policy rather than in mediating and coordinating different policy positions, policy making is unhinged from any institutional base.

What Is to Be Done?

Our system of government does not, for better or worse, lend itself to collegial processes of decision-making. Constitutionally, the President is the Chief Executive and the Commander-in-Chief. Strictly speaking, he has only to share power with Congress, something Presidents have grown more reluctant to do—ironically, more reluctant in proportion to the controversiality of their policies.

Good processes, however, do reduce the risk of erratic and inconsistent decisions and heighten awareness of trade-offs and costs. But for any given President a good process is one that helps him achieve his goals, not one that slows those down. A President who is disposed to achieving a particular set of goals will manipulate the machinery until he comes up with the right answers. The succession of Assistant Secretaries for Inter-American Affairs in the Reagan administration attests to this, at least until the appointment of Elliot Abrams, whose enthusiasms were deemed sufficient to the task. This, however, is a far cry from engaging the machinery of government so as to learn from it.

It is clear that institutionalization, never very strong, has suffered considerably in American government over recent decades. The fact that the White House is bigger and more compartmentalized is *not* itself testimony to institutionalization. Fewer and fewer memory traces are being left in government.

This problem has grown acute in foreign policy. Idiosyncracies of Presidential style are a factor. Even more fundamental is the absence of a consensus on matters of foreign policy. The absence of agreement—in fact, the disagreements have never been stronger—probably has been responsible for much of the breakdown of the consultative processes. Potential opposition appears to lurk everywhere.

More agreement about policy probably would promote tendencies to trust a wider set of players and could lead to greater *regularity* and *orchestration*. Although there

is no reason to think that matters necessarily will get worse in this regard, there also is no reason to think that they will get better by their own accord. On many fundamental foreign policy issues there are, in fact, powerful reasons to believe that the activist cores of our two major political parties are very far apart and that they will continue to exert influence, if indirectly, on their candidates and, ultimately, on whomever emerges as President.[20]

In our system, Presidents have a great deal of latitude to do as they please in foreign affairs (at least until Congress or public opinion catch up to them) and do not need to feel as constrained by collegial processes as heads of governments in other systems. Yet, if the results in the management of foreign policy of recent administrations is evidence of anything, it is that Presidents do need help, and some, such as Bush, appear willing to seek it. For the most part, though, the help Presidents need is of the kind they are least likely to seek.

Notes

1. In John Burke's view, the Presidency has become more institutionalized because of the development of organizational units within the EOP. That is, however, a limited perspective on institutionalization. See John P. Burke, "The Institutional Presidency," in *The Presidency and the Political System*, ed. Michael Nelson, second edition (Washington: CQ Press, 1988), pp. 355-78.

2. See Joel D. Aberbach, Robert D. Putnam, and Bert A. Rockman, *Bureaucrats and Politicians in Western Democracies* (Cambridge, Mass.: Harvard University Press, 1981), esp. chapters 4 and 8.

3. Bert A. Rockman, "America's Departments of State: Irregular and Regular Syndromes of Foreign Policy Making," *American Political Science Review* 75 (December 1981): 911-27.

4. Alexander L. George, "The Case for Multiple Advocacy in Making Foreign Policy," *American Political Science Review* 66 (September 1972): 751-85.

5. See Colin Campbell, *Governments Under Stress: Political Executives and Key Bureaucrats in Washington, London, and Ottawa* (Toronto: University of Toronto Press, 1983).

6. For evidence of idiosyncratic aspects of the Eisenhower period, see George C. Edwards III, "The Two Presidencies: A Reevaluation," *American Politics Quarterly* 14 (July 1986): 247-63.

7. Samuel P. Huntington, "Political Modernization: America vs. Europe," in S.P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968), esp. pp. 109-21.

8. Walter Millis, *The Martial Spirit* (New York: The Literary Guild of America, 1931).

9. Stephen Skowronek, *Building A New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge, England: Cambridge University Press, 1982).

10. In regard to the branch dominance of the American military forces, see Paul Y. Hammond, *Organizing for Defense: The American Military Establishment* (Princeton: Princeton University Press, 1961).

11. Paul Y. Hammond, "The National Security Council as a Device for Interdepartmental Coordination: An Interpretation and Appraisal," *American Political Science Review* 54 (December 1960): 900.

12. Stanley L. Falk, "The National Security Council Under Truman, Eisenhower, and Kennedy," *Political Science Quarterly* 79 (Spring 1964): 403-34.

13. James G. March and Johan P. Olsen, "The New Institutionalism: Organizational Factors in Political Life," *American Political Science Review* 78 (September 1984): 734-49.

14. Richard E. Neustadt, *Presidential Power* (New York: John Wiley, 1960).

15. Garry Wills, *The Kennedy Imprisonment: A Meditation on Power* (Boston: Little, Brown, 1982).

16. Zbigniew K. Brzezinski, *Power and Principle: Memoirs of the National Security Advisor, 1977-1981* (New York: Farrar, Straus, Giroux, 1983).

17. A personal interview with an official (who must remain anonymous) from the Carter White House staff (1981).

18. Colin Campbell, *Managing the Presidency* (Pittsburgh: University of Pittsburgh Press, 1986).

19. See Carey Covington, "Organizational Memory in Presidential Agencies," *Administration & Society* 17 (August 1985): 171-96.

20. See Warren E. Miller and M. Kent Jennings, *Parties in Transition: A Longitudinal Study of Party Elites and Party Supporters* (New York: Russell Sage Foundation, 1987).

PART III

THE CONSTITUTION AND FOREIGN POLICY

THE WAR POWERS RESOLUTION

By JOHN C. CULVER
Arent, Fox, Kintner, Plotkin & Kahn

By seeking to provide that a concurrent resolution shall have the force of law, we are embarking on an extremely dangerous, and probably unconstitutional course of action.

—Jimmy Carter

IN A VALEDICTORY ADDRESS IN NOVEMBER 1987, THE SECretary of Defense expressed his views on the perils of a congressional seizure of power from the President—"a pattern that spells disaster for American interests—interminable debate in place of prompt action and sudden lurches in place of steady policies." He concluded, saying there is "no sign that Congress understands itself to be embarking on a radical redesign of the separation of powers."

I cannot claim, as Mr. Weinberger does, to be echoing the clear intent of the constitutional framers. The very fact of this symposium and its diversity of scholarly and professional viewpoints reflects that the intent and design of the constitutional fathers was much more eclectic, much more a blend, much more tentative than the sharply etched image of a separation of explicit powers and responsibilities between the President and the Congress that Secretary Weinberger draws. The Secretary, whose love of Shakespearean theater has been rivalled only by his recourse to Churchillian cadences and Hamiltonian utterances, speaks to one strain in our

The Honorable John C. Culver served as the Senator from Iowa.

constitutional experience, but not to its sole or, I submit, even the dominant one.

The Madisonian and Jeffersonian motif has been even stronger. Madison said, "In no part of the Constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department.... War is in fact the true means of executive aggrandizement." And was it not Jefferson who expressed the hope that "we have already given for example one effective check to the 'Dog of War' by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."

I cannot—and do not have the scholarly background to—give fresh revelation to all the constitutional conundra regarding foreign affairs and national security. Suffice to make a few preliminary points:

The motivations and incentives for writing the Constitution were heightened—more than most of our school books suggested—by a sense of fragile security and external danger in the last years of the Confederation and crystallized by a felt need for a central capacity to define and execute national policy.

But it is also fairly evident that the notion of central government rested on the vision of a government of both *shared* and *separated* powers. A balance of powers and checks was more important than a concentration in or monopolization of power by any one branch, however more efficient and tidy the latter might be.

From this starting point, I would like to draw more directly on personal experience and observation as a Member of Congress for 16 years who served in the House of Representatives on the Foreign Affairs Committee and in the Senate on the Armed Services Committee. My involvement over that arc of time included most of the Vietnam war, the debate over the War Powers Resolution, effort on my part to find mechanisms by which there might be a greater synchronization of our foreign policy objectives on the one hand and our military capacities on the other, and an involvement in several running

controversies over weapons systems such as the B-1 Bomber and the AWACs sale to Iran.

From that vantage and the enforced luxury of observing executive-legislative relations from a more sheltered distance since 1981, I have a few reflections on the war powers issue to share.

I come to this arena as a relic of a rare species—a liberal Democratic member in the House who actually voted *against* the War Powers Resolution. I also voted to sustain President Nixon's unsuccessful veto of the ultimate bill, which sought to homogenize the House and Senate versions.

My opposition was principally based on the fact that the bill acknowledged a wide—almost limitless—scope of Presidential power for 60-90 days—a grant or delegation of war power larger in my judgment than that expressly conveyed or even implicitly inferred by the Constitution itself. Nor did it seem wise to me to engage forces on a timetable that invited both our President and our adversaries to orchestrate and distort their actions to exploit the 60-day window of maneuver and independent action. Such an artificial construct seemed to me an arbitrary and misshapen environment in which to pursue the highest interests of our nation.

I believe that the *issues* embedded in the War Powers Resolution are real ones and that it was altogether proper for the Congress to seek a more defined exposition of its relations with the Executive on this vital dimension of national policy. Heretic though I may have been on the War Powers debate of 1972-73 and on the dangers I have always sensed in Congress tinkering with the Constitution, I am not one who believes that we should necessarily return to where we were in the years preceding the adoption of the War Powers Resolution.

Though the margin necessary to override President Nixon's veto in the House was probably the result of Watergate and the rigid and expansive definitions of Presidential power which were advanced at the time, I must recall that there was a substantial body of feeling

already present in the Congress that an act was necessary. The war powers movement had its well-springs across a broad political spectrum. In the Senate, members such as Senator Stennis, Senator Javits, Senator Dole, and Senator Spong of Virginia were prominent advocates. It was not a narrow political point of view. A two-thirds majority for its type of War Powers Resolution existed in the Senate well before Watergate and the particular events of 1973.

It had as its principal objective not the "seizure" of power from the President or the imposition of a process of congressional micro-management of foreign policy; but rather it represented a genuine effort to recapture not only the spirit but the clear intent of the constitutional framers to have the Congress share responsibility and accountability with the President.

Part at least of the purpose of the resolution—in both Houses—was to create a measure of self-discipline within the Congress, to make it come to terms with the meaning and implications of military involvements, to confront issues directly rather than obliquely or by creeping incrementalism. Certainly the Gulf of Tonkin Resolution adopted in herd-like obedience on the basis of selective evidence and unexamined premises cast a long shadow over the War Powers debate.

However, this issue was not an impulsive or episodic reaction to just one President or one particular set of events. There was a powerful awareness that in our democracy the commitment of troops and resources was only durable and proper if it had the underpinning of broad public support as reflected in the Congress.

We see this again in the Persian Gulf, where an aggregation of decisions and spasmodic reactions were depicted as major tests of national will and interest. The Executive argues that none of his discrete and individual actions fall within the strictures of the War Powers Resolution, yet at the same time argues that the totality of these actions constitutes a solemn and inescapable commitment.

Unhappily, the War Powers Resolution we have in several of its features is not an ideal vehicle for resolving the debate over these commitments.

—President Reagan renounced the resolution, declaring it to be an invalid declaration of constitutional extra-territoriality by the Congress.
—The Supreme Court cast doubt on the concurrent resolution feature of the resolution by its congressional veto ruling in the *Chadha* case.
—One hundred and ten Congressmen sought standing in US District Court to force the President to comply with the consultation and time trigger mechanisms of the resolution.
—Both sides desired some form of ultimate constitutional test in the Supreme Court—but not now.
—A number of House and Senate Members favored a recasting of the resolution more nearly along the lines of the original Senate version, narrowing the areas of permissible action by the President alone, but doubt their capacity to muster sufficient majorities.
—Still others favored a blue-ribbon commission to review the whole war powers issue.

For now, we must uncomfortably live with the resolution we have, with all of its flaws. And those sections that seem least exposed to constitutional infirmity—the *consultation provisions*—can be given life and substance to the clear advantage of our foreign policy. The strength of the War Powers Resolution we have is that it contains the ingredients for greatly improving the flow of information and the detection of policy weaknesses.

In the Intelligence Act, prescribing communication between the intelligence community and the Intelligence Committees, and in the refinements that follow the Iran-contra report, we have examples of how regularized, dependable, and productive consultation could be achieved in the war powers area as well. Instead of decrying congressional seizure, fickleness, leakiness, and

undependability, the administration—and administrations to follow—could effectively build more confidence and collaboration by a variety of consultative mechanisms that move beyond mere notification or explanation *after* the fact.

If an administration hews to a "boob" theory about Congress or views it as the enemy, the dangers of policy failure and damage to our national interest only increase—as Admiral Poindexter, Bill Casey, and Ollie North have shown only too well. As stated in the Iran-contra report "The common ingredients of the Iran and contra policies were secrecy, deception and disdain for the law." To be sure, the web of necessary consultation with Congress is more complex today than it was before Vietnam, but it should be possible to devise, as the intelligence committees have, a representative congressional sounding board which includes the leadership as well as representation from the relevant committees.

One can quarrel about exact lines of constitutional demarcation between the President and Congress and split hairs over what constitutes "imminent hostilities." But those differences and concerns are mitigated if there is a dependable and recognized avenue of consultation.

Consultation does not automatically gestate consensus, but it is surely a pre-condition. On the other hand, foreign policy by Executive preemption almost always has a painful recoil. Theories of petrified Presidential prerogative may occasionally produce a flash success, but usually only postpone the need to rally public and political support. It is in the nature of our system that a true validation of the national or public interest requires the shared involvement of the Congress. One of the central reasons I voted against the resolution is that it grants the President too much free play to commit us to war and the expressed authority to enlarge the nature of the crisis for 60 to 90 days, which force a congressional choice that may be too Draconian—to foreclose the military involvement or give the Executive a blank check. The present configuration of War Powers in fact could invite another action like the Gulf of Tonkin.

In arguing for the legitimacy and value of consultation, let me again draw on personal experience. When I first entered Congress in 1965 the Members, myself included, were if anything too acquiescent and deferential in conceding superior wisdom and expertise to the executive branch in the foreign policy field. When I left the Senate in 1981, the Members, myself included, were if anything too automatically assuming that Executive testimony, information, and analysis was tainted or suspect. The cause was not hard to detect: the Vietnam experience, with its deceit and secrecy, had shattered congressional *trust*, not only in the omniscience of the Executive but also in its simple willingness to convey unvarnished truths. Though the Executive undeniably possessed more information, his accuracy and the integrity of presentation were much in doubt.

In spite of the serious damage to the relationship between the Executive and Congress with the Iran-contra experience and the controversy over our Persian Gulf and Central America policies, I cling to the belief that it is possible to achieve a healthier equilibrium in the relationship. Frank consultation will inevitably produce moments of contention and disagreement, but most of the time the end result will help to test assumptions and build confidence. Much of the time, the experienced reactions and political insights of Members of Congress will help to give better shape, sustainability, and realism to the problem under discussion. And even members not deeply experienced in these areas often express commonsense judgment and instinct which is quite as important in its contribution to sound policy as the sophisticated expertise of the professional. The wise Executive should view consultation as neither a threat to secrets nor as a forbidding and intimidating chore but rather as a potentially beneficial and valued exercise in achieving both strengthened support and a sensible policy.

In my experience, Congress in fact has *generally* not sought a very high threshold of information and has accepted as sufficient, fairly routine and arguably

inadequate briefings. Undoubtedly more vigorous and vigilant congressional oversight might have avoided some of the tragedy of the Iran-contra affair. Admittedly at times, Congress has tipped in the other direction when members insist on overly detailed and repetitive reports in both written and oral form. There is no easy cure for this, but regularized processes of consultation mitigate the number of spasmodic and impulsive demands for avalanches of information.

When there are acknowledged channels for the exchange of views, flow of information and advice, and when these opportunities are utilized in reciprocal good faith and respect, our democracy is better served and the chance of mischief and even disaster reduced. A climate of distrust, contempt, and mutual demonization by the two branches will only produce policy closure and at times recourse to constitutional or legal short-circuiting, as we discovered in Iran-contra and earlier in Watergate, or in excessive encroachment upon Presidential authority by the Congress. Arrogance by the Executive will guarantee barren warfare with the Congress at the expense of the country. Common courtesy and political sensibility in these matters is as important and valuable as formal process.

The War Powers Resolution has a double edge. It is distorting in that it focuses too much debate on problems of constitutional definition and prerogative. Many of our foreign policy issues today lie in gray areas where it is hard to establish clear and timeless markers. But if precise mapping of the contours of foreign policy is chancy, this does not underwrite a doctrine of absolute Presidential discretion and a bottomless reservoir of Executive power.

This is a condition that the War Powers Resolution tries to address. By trying to maximize genuine interaction between the President and Congress without assertions of power monopoly on either side, the tensions abate and the process of achieving public support is enhanced. By almost any measure, our worst mistakes

and performances in foreign policy occur when the wagons are circled, when policy is formed with Congress depicted as a menace, and when the ensemble of policymakers is too self-enclosed. In 1972, when the War Powers Resolution was under consideration in the Senate, one of our great constitutional scholars, Alexander Bickel, wrote

> There is no assurance of wisdom in Congress, and no such assurance in the presidency, on domestic problems or foreign. *The only assurance there is lies in process, in the duty to explain, justify and persuade, to define the national interest by evoking it, and thus to act by consent.* Congress will sometimes fail to give its consent to wisdom, and hold out for foolishness. At such times, the President, who is differently constituted, has enormous leverage as a persuader and great power as a brake. Singly, either the President or Congress can fall into bad errors, of commission or omission. So they can together, too, but that is somewhat *less likely*, and in any event, together they are all we've got.

That is the ultimate justification, not necessarily for *the War Powers Resolution* we have, but for a war powers process in which there is a mutuality of responsibility and respect within both the Executive and the Congress. Out of conferences such as this one, we may see the way to reaching a more measured and durable basis for the fulfillment of that joint obligation and shared constitutional duty.

THE LEGITIMACY OF THE CONGRESSIONAL NATIONAL SECURITY ROLE

By LOUIS FISHER
Congressional Research Service,
Library of Congress

The Congress shares both the power and the responsibility for our foreign policy.
—President Ronald Reagan, April 27, 1983

WHAT MAY THE PRESIDENT DO PURSUANT TO HIS EXPRESS powers? What is added by so-called "inherent or implied" powers? What is the role of Congress? What statutory constraints operate on the President? Do we want the realm of "national security" exercised solely by the President?

In January 1987, addressing the Federalist Society in Washington, DC, Vice President Bush urged Congress and the judiciary not to interfere with the President's conduct of foreign policy. He said the Founding Fathers did not intend that our foreign policy should be conducted and reviewed by grand juries."[1] Probably so, but neither did the Founding Fathers intend for White House staff and private citizens to carry out foreign policy operations, break laws, and invoke the Fifth Amendment, all done with little clear knowledge by the President.

Mr. Bush claimed that the framers of the Constitution intended that the President play the paramount role in implementing foreign policy. "Over the last 20 years,"

he said, "we have witnessed a departure from the way we have conducted foreign policy for nearly two centuries. Congress has asserted an increasingly influential role in the micro-management of foreign policy—foreign operations, if you will—and at the same time Congress, through the use of laws ..., ushered courts and lawyers into an uncomfortable but very visible role in the development of our foreign policy."

The term "micromanagement" is obscure, if not trite. Executive officials sometimes use it to shield operations that cannot survive public and congressional scrutiny, perhaps the kind of adventures attempted in the Iran-contra affair. When the executive branch is not properly supervised by the President, and when executive activities violate laws passed by Congress, congressional intervention is both inevitable and desirable. If the President wants less interference with his operations, he must assure that the operations are within the law and can attract the support of Congress and the public.

Constitutional Principles

Mr. Bush asserts that congressional involvement in foreign affairs is of recent vintage. The record, in fact, suggests the opposite. What is new is the claim of a Presidential monopoly in foreign affairs. During the nineteenth century, Congress shared significantly in questions of war, peace, and national security.

The Constitution makes the President "Commander in Chief" of the armed forces. Where this power begins and ends has long mystified the courts. In 1850, in *Fleming v. Page*, the Supreme Court stated that the President, as commander in chief, "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[2] This appears to be a broad reading of the Commander in Chief clause, but the Court refers to the power to move forces "placed *by law* at his command."

The President depends on Congress to provide the authorizations and appropriations necessary for military action. Under the Constitution, it is the responsibility of Congress to raise and support the military forces, to make military regulations, to provide for calling up the militia to suppress insurrections and to repel invasions, and to provide for the organization and disciplining of the militia. Through its power of the purse, Congress can withhold funds. When it does appropriate, it may place restrictions and conditions on the use of funds.

In 1868 Congress passed a law (still in effect) that directed the President to demand from a foreign government the reason for depriving any American citizen of liberty. If it appeared wrongful and in violation of the rights of American citizenship, the President was to demand the citizen's release. If the government delayed or refused, the President could use such means as he thought necessary and proper to obtain their release, but Congress specified that these means could not amount "to acts of war."[3]

In the Chinese Exclusion case, decided by the Supreme Court in 1889, warmaking was still at that time considered a congressional prerogative. England wanted our naval forces to act in concert with France against China. The Court noted: "As this proposition involved a participation in existing hostilities, the request could not be acceded to, and the Secretary of State, in his communication to the English government, explained that the war-making power of the United States was not vested in the President but in Congress, and that he had no authority, therefore, to order aggressive hostilities to be undertaken."[4]

Presidential war powers have expanded in the twentieth century because of several developments. The idea of "defensive war" was originally limited to protective actions against the borders of the United States or naval wars against the Barbary pirates and France. After World War II, defensive war assumed a much broader meaning. American forces are spread throughout the world;

military commitments are placed in defense pacts and treaties. Under agreements such as NATO, an attack on an ally means an attack on the United States. Presidents also have used military force recently to protect American lives and property, often stretching those objectives to achieve foreign policy or military objectives. Examples include the Dominican Republic in 1965, Cambodia in 1970, and Grenada in 1983. The bombing of Libya in 1986 was justified as an anti-terrorist response.

The exercise of Presidential war power by Lyndon Johnson and Richard Nixon provoked Congress to pass legislation in an effort to curb such Executive initiatives. Congress resorted to its power of the purse in 1973 to cut off funds for combat activities in Cambodia and Laos, but Nixon vetoed the bill and Congress failed to muster the two-thirds majority in each House for an override. A compromise bill delayed the cutoff of funds for another forty-five days.

This experience reinforced the congressional drive for the War Powers Resolution of 1973. There are three main provisions: Presidential consultation with Congress, Presidential reports to Congress, and congressional termination of military action. The purpose of the resolution, as stated in section 2(a), is "to insure that the collective judgment" of both branches will apply to the introduction of US forces into hostilities.

The Need for Collective Judgment

How do we evaluate the War Powers Resolution? Obviously it is not self-enforcing. A statutory mechanism, by itself, cannot police the boundaries of congressional and Presidential power. The success of the resolution must be measured largely in its ability to alter attitudes and conduct. Does it change the context for Presidential action? Does it strengthen the judgment that resort to war must have the joint backing of both branches?

Although the War Powers Resolution continues to be criticized as unworkable and as an encroachment on Presidential responsibilities, there is greater appreciation today that Presidential military actions must have the support and understanding of Congress. As a postmortem on the Vietnam war, Secretary of State Kissinger offered this perspective in 1975: "Comity between the executive and legislative branches is the only possible basis for national action. The decade-long struggle in this country over executive dominance in foreign affairs is over. The recognition that Congress is a coequal branch of government is the dominant fact of national politics today. The executive accepts that the Congress must have both the sense and the reality of participation: foreign policy must be a shared enterprise."[5] The "collective judgment" anticipated by the War Powers Resolution is an essential condition for creating effective policies in military and foreign affairs.

In a major address in 1984, Defense Secretary Caspar Weinberger announced the basic principles that promote national security. He said that the "single most critical element of a successful democracy is a strong consensus of support and agreement for our basic purposes. Policies formed without a clear understanding of what we hope to achieve will never work."[6] Before committing forces into combat, "there must be some reasonable assurance that we will have the support of the American people and their elected representatives in Congress.... We cannot fight a battle with the Congress at home while asking our troops to win a war overseas...."[7]

What happens when the President and White House aides decide to bypass Congress and initiate secret policies abroad? If the President were to confront a genuine emergency which did not permit consultation with Congress or the enactment of authorizing legislation, he might decide to invoke the prerogative which is the Executive's power to act for the public good in the absence of specific law and sometimes even against it. Abraham Lincoln claimed that authority in April 1861

while Congress was in recess. He issued proclamations calling forth state militias, suspending the writ of habeas corpus, and placing a blockade on the rebellious states. He told Congress that his actions, "whether strictly legal or not," were necessary for the public good.[8] Congress then passed a statute legalizing his proclamations "as if they had been issued and done under the previous express authority and direction of the Congress of the United States."[9]

Legislative sanction is an essential ingredient of the prerogative. In times of national emergency, the Executive may act outside the law but he must submit his case to the legislature and the people for approval. The second ingredient is that the emergency must be genuine and not contrived. Invoking the prerogative is unwarranted if the President allows conditions to fester and deteriorate to the point of emergency, without making an effort during that period to consult with Congress and seek its support for collective action. The prerogative is not to be invoked simply because the President has been unable to attract congressional support for his policies.

Justice Jackson's theory of the President's emergency power, announced in the Steel Seizure case of 1952, helps to understand the dynamics of constitutional power. He sketched out three scenarios.

(A) Presidential power reaches its highest level when the President acts pursuant to congressional authorization. Here he acts with the full complement of constitutional and statutory powers.

(B) Presidential power is at what Jackson called its "lowest ebb" when the President takes measures incompatible with the will of Congress. This was President Reagan's predicament with regard to aiding the contras.

(C) In between these two categories lay a "zone of twilight" in which Congress neither grants nor denies authority. In such circumstances, "congressional inertia, indifference or aquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential action. In this area, any actual test

of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[10]

Jackson's model applies to actions by Presidents Carter and Reagan. Carter's termination of the Taiwan defense treaty, without any consultation with legislators, was not effectively challenged by Congress. The Senate acted on June 6, 1979, but never took a final vote. When the case reached the Supreme Court later that year, Justice Powell remarked that if Congress "chooses not to confront the President, it is not our task to do so." Only when the two branches are in irreconcilable conflict over treaty termination is the Court likely to resolve the dispute.[11]

When the Supreme Court upheld Carter's actions against Iran, including his freezing of assets and the suspension of claims pending in American courts, it did so in part because of congressional acquiescence. The Court said that Presidents have a freer hand in foreign affairs "where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President."[12] The Court took notice of Congress' failure to disapprove Carter's action or even to pass a resolution expressing its objection.

A similar result occurred with litigation over President Reagan's actions in Central America. Members of Congress went to court to contest military initiatives by the Reagan administration in El Salvador. This lawsuit was turned aside by a Federal court on the ground that the determination of what constitutes hostilities or imminent hostilities is essentially a factfinding matter reserved to Congress, not the courts. However, the case was also dismissed because Congress had failed to take any legislative action to thwart President Reagan.[13]

The Belief in Presidential Supremacy

Much of the debate on the allocation of foreign affairs between Congress and the President revolves

around two competing models. Under the *Curtiss-Wright* doctrine of 1936, the President is blessed with extra-constitutional, inherent powers. According to this model, the necessities of international affairs and diplomacy make the President the dominant figure. Instead of confining himself to the specific issue of delegation which was before the Court, Justice Sutherland added pages of obiter dicta to describe the far-reaching dimensions of executive power in foreign affairs. He assigned to the President a number of powers not found in the Constitution.[14] *Curtiss-Wright* is cited frequently to justify not only broad grants of legislative power to the President but also the exercise of inherent, independent, and implied powers for the President.[15]

The competing model is the Steel Seizure case of 1952, which assumes that Congress is the basic lawmaker in both domestic and foreign affairs. However, as Justice Jackson pointed out in this case, congressional inertia, silence, or acquiescence may invite independent and conclusive actions by the Executive.

The lesson to be drawn from either model is that Congress has ample powers to legislate for emergencies, at home or abroad, but those powers must be exercised. Legislative influence and control depend on the willingness of Congress to take responsibility. Moreover, Presidential influence, at least for long-term commitments, cannot survive on assertions of inherent power. The President needs the support and understanding of both Congress and the public.

The President, therefore, is not the sole voice in foreign affairs. He cannot, or should not, isolate himself from Congress and the general public, dismissing their involvement as narrow, local, uninformed, or parochial. Patsy T. Mink, after careers both in Congress and the State Department, warned that it "is folly to believe, as many in the top echelons of State and White House staff sincerely do, that good foreign policy necessarily stands above the pressures of domestic politics and constituent interests. Politics is the art of reconciling and educating,

not of avoiding, those interests."[16] For that task the President needs Members of Congress to develop and support effective international policies.

The Iran-Contra Affair

How does this general framework apply to the Iran-contra affair? What might be done to minimize a recurrence of White House adventurism? Is there any way to reduce the size of Jackson's "zone of twilight" so that future Presidential actions will more likely be exercised within political and legal boundaries?

There is a limit to what can be expected from new statutory remedies. Statutory language is inherently vague, and opportunities always exist for Executive abuse and deliberate misinterpretation. We can hope for "good faith" relations between the branches, and often that prevails, but the reality is that a number of Presidential appointees and assistants have little understanding of Congress or the Constitution. Their strong personal ties to the President create a desire to satisfy his goals by means legal or illegal. For their part, many Members of Congress have an inadequate understanding of legislative prerogatives and responsibilities.

The Iran-contra affair had its source in fundamental misconceptions about executive-legislative relations in foreign policy. Key witnesses testified that foreign policy is within the exclusive control of the President. They regarded congressional interference, by its very nature, as illegitimate—to be ignored or circumvented whenever necessary. The sad fact is that some Members of Congress think the same way.

This belief invites consequences. Witnesses claimed that if Congress denies the President funds to implement his foreign policy, the President can seek funds from private parties and foreign governments. The effect is to join the sword with the purse, which is precisely what the framers feared. If Congress investigated to determine what activities were taking place, the theory of

Presidential supremacy justified the withholding of information to conceal operations. Lies and deception became part of the package of tools needed to protect Presidential policy. Duplicity was practiced not only against Congress but Cabinet officers as well. To preserve the high-flying prerogative of the President, executive officials resorted to guile, deceit, dissimulation, and bad faith. So long as this theory of Presidential omnipotence in foreign affairs is championed, we can expect variations of Iran-contra in the future.

Attitudes that produced Iran-contra can be altered to some extent by congressional action. First, the National Security Council should be excluded from *operations*. That conclusion was reached by the Tower Commission and endorsed by President Reagan and National Security Adviser Frank Carlucci. The NSC's statutory mission of coordinating information and advising the President is compromised when it becomes involved in operations. It loses objectivity and detachment. Nevertheless, the Tower Commission opposed any *statutory action* that would prohibit NSC's involvement in operations. The report claimed that the term "operations" is too vague to justify statutory action.[17]

This argument is unpersuasive. If the word is clear enough to be used by the Tower Commission, by President Reagan, and by National Security Adviser Carlucci, it is clear enough to be used by Congress. If the problem is language, let us decide what NSC should not do and say so. Perhaps the prohibition should be on the conduct of covert operations. Either way, statutory restrictions are needed. Legislative action would emphasize that the NSC is not, as the Tower report claimed, the President's "creature."[18] It was created by Congress and is funded each year by Congress. Its duties and powers can be defined and refined by Congress.

Second, was the NSC subject to Boland amendment restrictions from 1984 to 1986? The Boland amendment during that period prohibited military assistance to the contras by the CIA, the Defense Department, or "any

other agency or entity of the United States involved in intelligence activities." Supporters of the administration claim that the NSC was not covered by this restriction. Under their theory, John Poindexter, Oliver North, and others on the NSC staff could do what the intelligence agencies could not.

This argument is far too clever. A close look at the US Code and Executive Orders demonstrates the weakness of this position. The CIA is subject to NSC's control. Under 50 USC 403(a), "There is established under the National Security Council a Central Intelligence Agency...." Could a subordinate body like the CIA be involved in intelligence activities without the controlling body (the NSC) also being involved? The NSC-CIA relationship is further clarified by examining Executive Order 12333, issued by President Reagan on 4 December 1981. Section 1.2 states that the NSC "shall act as the highest Executive Branch entity that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence and special activities [i.e., covert operations], and attendant policies and programs." As defined by section 1.5, the Director of Central Intelligence "shall be responsible directly to the President and the NSC...." Under section 1.8(f), the CIA shall "conduct services of common concern for the Intelligence Community as directed by the NSC." Who implements Executive Order 12333, which is entitled "United States Intelligence Activities?" Under section 3.2, the principal responsibility falls to the NSC.

Third, the Intelligence Authorization Act of 1980 needs revision. The statutory language is an open invitation to executive manipulation. The section on congressional oversight provides that the Intelligence Committees shall be kept informed "to the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and

information relating to intelligence sources and methods."[19] In the hands of executive officials interested in wielding control and concentrating power, this language means little more than that the Intelligence Committees will be informed if the executive branch feels like it.

The statute provides that if the President determines "it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate."[20] It is clear that President Reagan did not even inform this select group of eight members about the Iran-contra activities.

Under the statute, the CIA Director and the heads of other agencies involved in intelligence activities are to report "in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure."[21] Not only did CIA Director Casey fail to notify the committees, he obtained a letter from President Reagan forbidding him to do so.

The statute requires the President to "fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence."[22] President Reagan shared nothing with the committees until the story about arms to Iran appeared in a Lebanese newspaper.

This statute needs to be clarified. If emergency conditions require the President to delay the notification to the Intelligence Committees, the maximum delay should be specified in law, such as "for not more than 48 hours." The statute should prohibit the President from making "oral findings" to authorize a covert operation. Findings should be written, signed by the President, preserved as permanent records, and distributed to the appropriate

committees of Congress and the statutory members of the National Security Council. It is intolerable for someone like President Reagan to authorize an arms shipment to Iran and later claim that he had no recollection of when he did it, or for John Poindexter to destroy a finding because it is politically embarrassing, or for key members of the National Security Council, such as Secretary of State George Shultz, not to be told of a finding.

Fourth, why not limit the offices of the CIA Director and Deputy Director to a fixed term? Bills have been introduced in the past to limit the term to 8 or 10 years, similar to the post of FBI Director, but I would limit the term to 4 years. The potential for CIA abuse is too great, given its access to secret funds, its involvement in covert operations, and the limited degree of congressional oversight. If a President is reelected, the CIA Director and Deputy Director should be renominated and reconfirmed. This means that William Casey would have had to be voted on again by the Senate in 1985. Given his performance over the first four years, including the mining of harbors in Nicaragua without adequate notification to the Intelligence Committees, Senate confirmation would have been highly unlikely. A report by the Senate Intelligence Committee in December 1981 made this revealing observation about Casey's failure to submit a full and reliable disclosure of his financial interests: "The Committee is concerned that this pattern suggests an insufficient appreciation of the obligation to provide complete and accurate information to the oversight committees of the Congress."[23]

Fifth, Congress should consider the addition of criminal penalties to certain of its statutes. The pull of loyalty to President Reagan was so strong that officials nonchalantly circumvented the Boland amendment and other statutes because criminal penalties were lacking. They should have been faced with the choice of loyalty to a President or fidelity to the law, with the prospect of fines and jail sentences helping them make the decision.

Sixth, there should be no circumvention of statutory prohibitions in appropriations bills by having agency officials solicit funds from private parties and foreign governments. There are those who argue that Congress is incapable of prohibiting these Presidential overtures. This argument is not persuasive; the cost of permitting extracurricular funding by the President is too costly for representative government. It is also repugnant to have the President go hat-in-hand to other governments for financial support, becoming involved in quid pro quos that will materialize later in the form of favors regarding arms sales or financial assistance.

When Congress voted to prohibit direct or indirect assistance to the contras, it should have been illegal for Oliver North, as a White House staffer, to make appearances around the country to drum up private financial contributions. If this practice is allowed, Congress will lose much of its power of the purse. After Congress had cut off funds for the Vietnam war in 1973, could President Nixon and his aides have appealed to private groups and foreign governments to provide supplemental funds to continue the war? This kind of activity should be illegal not only for the government officials who solicit assistance but for the private parties who contribute.

There are steps we should not take. The National Security Adviser should not be subject to Senate confirmation. The process of confirmation would elevate the Adviser's role and further diminish the stature of the Secretary of State. Moreover, there is no need to abolish the two Intelligence Committees and replace them with a joint committee. Each chamber of Congress needs its own independent capability for overseeing the intelligence community. Forming a joint committee would also give credence to the canard that Iran-contra somehow resulted from the congressional propensity to leak sensitive information.

The claim by Colonel North that lying is necessary for covert operations, and that Congress cannot be

trusted with sensitive information, is unfounded. He testified that "it is very important for the American people to understand that this is a dangerous world, we live at risk.... By their very nature, covert operations or special activities are a lie. There is great deceit, deception practiced in the conduct of covert operations. They are at essence a lie."[24]

In closed testimony, this philosophy—if it can be called that—was strongly repudiated by Clair George, a 32-year veteran of the CIA's Operations Division. He told the Iran-contra Committees: "I disagree with Colonel North, as strongly as I can disagree with anyone. This is a business ... of trust. This is a business that works outside the law, outside the United States. It is a business that is very difficult to define by legal terms because we are not working inside the American legal system. It is ... a business of being able to trust and have complete confidence in the people who work with you. And to think that because we deal in lies, and overseas we may lie and we may do other such things, that therefore that gives you some permission, some right or some particular reason to operate that way with your fellow employees, I would not only disagree with, I would say it would be the destruction of a secret service in a democracy... I deeply believe with the complexities of the oversight process and the relationship between a free legislative body and a secret spy service, that frankness is still the best and the only way to make it work."[25]

None of these recommendations, on their own, will prevent a recurrence of the Iran-contra affair. They will, however, alter the climate in which executive officials operate. They will introduce a note of caution for those who decide, for whatever reason, to take the law in their own hands. They are free to do so, but such conduct should come at a cost of fines and jail sentences. Before subordinates decide to plunge into lawless activities and poison the relationship between Congress and the President, they need to be restrained by supervisors who have a better and deeper understanding of government and our constitutional system.

Notes

1. "Bush Urges Lawmakers, Judges Not to Interfere in Foreign Policy," *Washington Post*, 31 January 1987, at A16.

2. Fleming v. Page, 50 U.S. (9 How.) 602, 614 (1850).

3. 15 Stat. 223 (1868); 22 U.S.C. 1732 (1982).

4. The Chinese Exclusion Case, 130 U.S. 581, 591 (1889).

5. 72 Dep't of State Bull. 562 (1975).

6. "The Uses of Military Power," News Release, Office of Assistant Secretary of Defense (Public Affairs), November 28, 1984, at 1.

7. Id. at 6.

8. 7 Messages and Papers of the Presidents 3225 (Richardson ed.)

9. 12 Stat. 326 (1861).

10. Youngstown Co. v. Sawyer, 343 U.S. 579, 635-637 (1952).

11. Goldwater v. Carter, 444 U.S. 996, 998 (1979).

12. Dames & Moore v. Regan, 453 U.S. 654, 678-679 (1981).

13. Crockett v. Reagan, 558 F.Supp. 893 (D.D.C. 1982), aff'd. 720 F.2d 1355 (D.C. Cir. 1983).

14. United States v. Curtiss-Wright, 299 U.S. 304 (1936).

15. For broad-delegation arguments, see Ex parte Endo, 323 U.S. 283, 298 n. 21 (1944); Zemel v. Rusk, 381 U.S. 1, 17 (1965); Goldwater v. Carter, 444 U.S. 996, 1000 n.1 (1979). Inherent powers, backed by references to *Curtiss-Wright*, are discussed in United States v. Pink, 315 U.S. 203, 229 (1942); Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); United States v. Mazurie, 419 U.S. 544, 566-567 (1975).

16. Thomas M. Franck, ed., *The Tethered Presidency* 74 (1981).

17. Report of the President's Special Review Board V-4, V-5 (26 February 1987).

18. Id. at I-3.

19. 50 U.S.C. 413(a) (1982).

20. Id. at 413(a)(1).

21. Id. at 413(a)(3).

22. Id. at 413(b).

23. S. Rept. No. 285, 97th Cong., 1st sess. 3 (December 1981).

24. Iran-contra hearings, transcript, July 7, 1987, at 22.

25. Id., August 6, 1987, at 173-75.

FOREIGN POLICY AND THE ECONOMIC WORLD ORDER OF THE 1990s

By GERALD GARVEY
Princeton University

The peculiarity attaching to the American system is merely that governmental control is divided between two centers, so that while one center may be attempting to control a given matter in execution of a power indubitably belonging to it, the other center may upon like grounds be attempting to control the same matter in a quite contradictory fashion and to quite contradictory ends.

—Edward S. Corwin

EDWARD S. CORWIN REFERRED TO TWO CENTERS PECULIAR to the American system of governmental control. The two centers are not, as might be supposed, Congress and the President. Corwin, writing in 1913,[1] was referring to tensions between national power and State power under the Treaty clause of the Constitution.[2]

In 1913, lawmakers and judges were still debating the extent to which the States, in exercise of their "reserved" police powers, could limit the combined authority of Congress and the President to legislate the nation's foreign policy agenda. State legislators' preoccupation with localized concerns could put them at odds with national officials whose positions called for a broader policy perspective and, frequently, one centered on international rather than domestic interests. Not surprisingly, the two centers might—as Corwin described it—try to legislate "to quite contrary ends," presenting classic cases for constitutional litigation.

The national-States relationship was often competitive, but, until recently, the two main power centers (Congress and the President) generally cooperated in foreign affairs. Such cooperation often required exercises of considerable ingenuity—a species of constitutional elaboration that might be termed "empowerment by pieces."

"Empowerment by Pieces"

A President may negotiate a treaty on certain subjects over which the Constitution gives Congress no expressed legislative power.[3] Nevertheless, under the Treaty clause, Congress has the power to ratify such an instrument. Ratification makes the treaty the supreme law of the land.[4] Under the Necessary and Proper or so-called coefficient clause,[5] Corwin argued, an implied power activated Congress to pass ancillary legislation. By hypothesis, such ancillary lawmaking would occur in support of policy objectives toward the attainment of which Congress had no *separate* constitutional power to make laws in the first place. In other words, combining "power by pieces" can create a constitutional capacity to perform certain functions, even when such functions cannot be undertaken under a specific grant to either branch.[6]

How does the empowerment by pieces process relate to national security?

The "national security" concept is a vector with multiple dimensions. These dimensions reach to issues of internal subversion and domestic rebellion as well as to those of defense against external extortion, intimidation, or military attack. They also reach to externally originating threats of a diplomatic or economic nature.

Focusing on those threats that originate abroad, a certain level of military preparedness, embodied in active forces, constitutes the foundation of a modern industrial nation's security. Reinforcing this foundation is a certain reserve-force mobilization capability. Overlying the military substratum are other elements of what can be called

the strategic base, such as diplomatic arrangements or economic and cultural values that tend to reduce the American sense of threat from particular nations.[7]

The strategic base, then, has two components: a strictly military foundation, which may take a variety of forms, and a nonmilitary superstructure, which is not any less important.

One looks in the near future for no circumstances in which US military forces will cease to provide the core of our national security—or for that matter, perhaps for the security of our trilateral (i.e., West European and Far Eastern) allies as well. But depending on possible changes in the nature of perceived external threats, or in the US resource base, our military forces may have to undergo restructuring. Furthermore, the nonmilitary components of the strategic base also may need appropriate adjustments.

Conceivably, the geographic buffers and economic hinterland (in the sense of the foreign trading area and overseas investment outlets), which Americans effectively secured by supplying defense services to trilateral allies, may cease to be major elements of the strategic base of US national security. Such a modification would be implicit in a return to a Fortress America posture. It could also result from a drift by our Free World allies toward protectionist foreign policies.

Conversely, the gradual realization of global multilateralism—the goal since 1944 of American international economic planners—would cause US citizens, their trading partners, and even their adversaries to realize that interpenetrating *economic* and *cultural* interests, rather than *military* forces, represent the stabilizing factor in international relations. In the event multilateralism should evolve, a redefinition of the strategic base of US national security would be in order so as to give due prominence to this nonmilitary superstructure.

The notion of the strategic base of national security evokes the complicated process of generating and manipulating resources to achieve specified goals. Physical

resources come immediately to mind, but during World War II Margaret Mead wrote an influential book about the importance of the *cultural* resources of an embattled people,[8] and many commentators have compared the efficiency of democratic versus totalitarian political systems only as war-waging resources.[9]

The Congress and the President may separately lay claim to certain authorities as related to national security, but a process of empowerment by pieces is needed to put them all together so as to equip the nation as a whole for self-defense. In defense budgeting, the President proposes but the Congress disposes. It is the Commander in Chief who directs the deployment of US military forces, subject to congressional oversight.

The nation possesses all powers that may be needed to preserve its existence and its freedoms.[10] Nevertheless, reasonable persons may disagree as to the real meaning of "needed." What is more, "national security" may take on increasing international *economic* connotations to go along with the military overtones of the term.

An Era of Executive Aggrandizement

For most of the period 1890-1940, national and State powers defined the two critical power centers within our constitutional system. But the decade of the 1930s, which saw the old Federal tension finally resolved overwhelmingly in favor of national power,[11] saw also a marked upward inflection in the trajectory of executive branch influence.

Yet, two centers of power remain, just as there still exist asymmetries in those two centers' constituencies and institutional interests. The President and his running mate—the only elected officials in our system with the mandate of a national constituency—often see issues and political interests differently than Members of Congress do, especially when a majority of the latter come from a party other than that of the President. Such asymmetries raise Corwin's problem of two centers acting "to quite

contradictory ends" all over again, but now the two centers are to be found *within* the national government and the characteristic conflicts are *between* Congress and an administration, rather than between the national and State governments.

Arguably, our postwar Presidents' conceptions of their official responsibilities—at least, once our internationalist commitment had been irrevocably accepted—made interdepartmental conflict inevitable.

American Presidents since early 1947—the enunciation of the Truman Doctrine almost permits one to fix the day that the world changed—have drawn on a budget of constitutional powers to deal with problems that were thrust on their administrations by events of the postwar era. So long as worldwide involvement was considered to be a given, American Presidents had no choice but to engage in ceaseless negotiations with allies, bargain with monetary and trading partners, and tilt with adversaries. These enterprises could be prosecuted best through Executive (rather than legislative) power. The framers themselves had recognized and assigned that peculiar capacity within the executive branch to manage foreign affairs. But the empowerment by pieces process was constantly at work, for only Congress could support the President with military forces, finance various international organizations (such as the World Bank), and authorize the institutional apparatus (such as a network of intelligence agencies).

Eventually the accretion of the one center's power, even if it occurred in the exercise of duties that had been thrust unsought upon it by historical circumstances,[12] must have excited the jealousy of the theoretically coequal center at the other end of Pennsylvania Avenue.

The impulse in Congress for the past two decades has been to check Executive prerogatives in foreign affairs and national security policy. If Congress could, in one set of historial circumstances, find implied constitutional powers to perfect a foreign policy initiative *not based* on any enumerated grant, it also could find

authority (sometimes based on a reading of the Constitution with which the Presidents' lawyers strenuously disagreed)[13] to limit Executive discretion. The Mansfield amendment, the War Powers Resolution, the Case Act, the Boland amendments, and innumerable other legislative strictures[14] now seek to limit Executive powers across the fields of arms control, foreign aid policy, alliance relationships, force deployments, and intelligence operations.

During the period of congressional attempts to disempower the Commander in Chief through restrictive legislation,[15] legislators have been alert—especially if they represent Rust Belt areas—to changes in the underlying structure of international relations.

Because of the broad powers that are available to the nation when its security may be at stake, changes from one policy to another rarely need to be revalidated constitutionally. Neither massive retaliation nor its successor-strategy, flexible response, was tested constitutionally: protectionism and free trade seem equally allowable commercial policies under the Commerce clause.

Nevertheless, foreign policy evolution clearly does impinge on the course of constitutional interpretation when—as occurred during the early Cold War years—it invites initiatives within one department that excite the jealousy of another department. Then the empowerment by pieces phenomenon, which is central in our system to effective conduct of foreign policy, becomes chaotic. There ensues the situation that Corwin described in which one center tries to control a matter in execution of a claimed constitutional duty while the other competing center works to control the same matter, but at cross-purposes.

Global Growth

According to some economic historians, a so-called long wave of growth started up during the late nineteenth century.[16] The discomfitures of the "post-oil shock" years raise questions as to whether or not this

wave can be sustained into the next century. If it can be, then the evolutionary tendency seems to be heading toward a worldwide, multi-tiered industrial pattern, i.e., one in which many nations can produce a wide variety of finished products and basic commodities. The phenomenon of multi-tiered specialization explains one of the most interesting of recent global economic developments, viz., the increase in intra-industry (as opposed to cross-industry) trade among the nations of the trilateral community.[17]

Inherent in the growth trend is a process of economic levelization—the gradual convergence of the levels of different national economies toward a more-nearly equal standard of living.[18] The convergence of the American and the Japanese economies since 1945 illustrates this apparently general tendency.

In the past, the growth pattern has reasserted itself even after radical interruptions or reversals. World Wars I and II represented such interruptions. They bracketed the economic disarray of the interwar years and were called "the economic consequences of the peace."[19] They included the Depression, protectionism, and the beggar-thy-neighbor economic policies, such as predatory currency devaluations and retaliatory tariff-making, which shrunk trade and produced an era of international economic closure.[20]

If American policy-makers were agreed on a single point of future economic planning for the post-World War II world, it was that the lessons of the interwar period should be learned. The closure of the 1930s, they believed, must give way to an open, multilateral trading system. This conviction underpinned the world order vision of the first years of the postwar international economic system, from 1944 (the year of the great economic conferences at Bretton Woods and Havana) to 1949 (the year of the creation of NATO).

American policy-makers once even envisioned a single global economic system, with Soviet participation.[21] On the political-diplomatic front, FDR's perception of the

United Nations also evoked a universalistic image. Failures in both the economic and the political spheres gave rise to the Cold War and the bipolar world order that dominated the consciousness of the second period, from 1949 till the late 1960s.

From Universalism to Bipolarity

Stalin's geostrategic chess moves and his political cynicism—his refusal to evacuate the Red Army from Eastern Europe, his abuse of the UN veto—are usually emphasized when explaining the failure of the concept of universalistic vision. But Stalin's economic intransigence—his refusal to participate in the convertible currency regime that American policy-makers wanted, his rejection of the Bretton Woods banking structure (the International Monetary Fund and the World Bank), and his withdrawal from Marshall Plan negotiations—were every bit as subversive of this universal concept as were his political and military moves.

The integrated Free World economic network (i.e., the "Bretton Woods system") *became* the counterpart of a Free World ideological, political, and military collective-security network—the Western or trilateral bloc. The territory outside of US borders, but enclosed within the perimeter of the bloc, defined both a geostrategic buffer (we would fight the Soviets, if need be, on European soil, not on our own) and an American economic hinterland (the entire trilateral area became a secure market, open to American commercial penetration).

The Free World system worked, in part at least, because the empowerment by pieces process worked. The bipartisanship of American foreign policy facilitated legislative-executive cooperation. Working in concern with Members of Congress to the twin ends of keeping a tense and tenuous peace and holding a Free World line against Communist expansion, executive branch policy-makers erected an interrelated set of institutions in support of the Western bloc structure. The empowerment-by-pieces process helped to produce the Free World alliance

structure, centered on NATO; the modern American military establishment based on a high-technology force structure, extended to protect the allies; the instruments of US foreign economic aid and military assistance; the intelligence community and apparatus; and a complexus of strictly economic institutions such as the General Agreement on Tariffs and Trade (GATT).

The Soviets formally expressed their mirroring conception of a world divided into two integrated blocs with their metaphor of the "two camps," and built a framework of counterpart economic and military structures, such as the CMEA (Council of Mutual Economic Assistance) and the Warsaw Treaty Organization.

Because of the hierarchical (i.e., patron-client) structure of relations within each bloc, the hegemon could control bloc policy. But the hegemon also had to bear the economic responsibility of the central banker-planner's role.

During the late 1940s and the 1950s, the Soviet invaders and conquerors, as well as patrons within the Warsaw Pact region, were able to extract resources from their satellites and determine the distribution of the intra-bloc defense burden in the USSR's interest. The Soviets in this period are estimated to have taken about as much out of Eastern Europe (mostly from East Germany) as the United States put into NATO-Europe in the form of Marshall Plan aid. But by the mid-1960s, the USSR had begun to shoulder the preponderance of the pact's security burden.[22]

Wartime destruction, not any condition inherent in the order of nature, had left the United States in its disproportionate position during the first postwar decade.[23] Recovery in Western Europe and Japan, plus the accession of so-called newly industrializing countries (NICs) to the growth cadre, had the predictable effect of reducing relative disparities. By the late 1960s, Americans could not fail to observe the outlines of a world in which the relative share of the global product accounted for by the biggest and most dynamic actor (the United States) no

longer seemed disproportionately larger than Japan's and West Germany's share. The makings of a new multipolar world order—and possibly, therefore, of yet a third period within the postwar era—could be discerned.

From Bipolarity to Multipolarity

The recent debunking of American hegemonic pretensions was stimulated in part by a kind of shock of recognition of the relatively eroded position of the United States.[21]

At different points in the decade 1966-75, Americans began to look about and see a new Europe, a spectacularly resurgent Japan at the center of a vast Eastern Pacific growth pole, a powerful oil cartel centered on Saudi Arabia, a Soviet Union whose military investments had clearly put it in the superpower category, and a new China awesomely determined to restart the domestic growth process and to play an active international role. The looming of the new powers on the horizon of world history implied possible future strategic combinations that had no relevance to bipolar calculations. The very concept of a "China Card" emphasizes this point.

A sense of impending change—not necessarily of catastrophe, but of crisis—now overhangs the international system. The old tightly integrated trilateral bloc image cannot be reconciled with the reality of new economic conditions—or with the increasing acerbity of intrabloc squabbling over trade policies and defense burden-sharing.

On both sides of the ideological divide, erstwhile clients have regained enough strength relative to that of their respective patrons to conceive of independent interests and want to exercise power independently of direction from Washington or Moscow. If the bipolar system is not actually breaking up, it is at least experiencing cracks in its foundations.

To the extent that American policy initiatives will influence the world order and that congressional involvement in foreign affairs will help to determine the US

policy line, the still-incomplete process of congressional *power-recovery* could strongly affect the direction of time's arrow.

Closure Versus Interdependence

The "closure" and "interdependence" ideal types offer themselves as extremes in a model of the world order evolutionary process, since they correspond to two crucial directions in the strategic bases of US security: the closure ideal type points toward a *contraction* of the geographic scope of the American presence abroad (e.g., a deemphasis of the overseas buffers and hinterland), and interdependence implies an *expansion* of US overseas economic-diplomatic involvements. Since the contrary pressures of closure and interdependence weigh in different ways on Congress and on the President, the likelihood that either course will be favored might depend on the prevailing balance of legislative-Executive power.

The political steam behind closure is building, not only in the United States—where more than one politician sees capital to be made from the protectionist position—but also in Europe and (for different reasons) in the Soviet Union.[25]

Closure would turn down some of the heat that is now being generated by organized labor groups and other lobbies in those industries that suffer from excess capacity, deep unemployment, and the severest pains of economic adjustment. With closure, the pains of transitional unemployment in adjustment-vulnerable sectors would be at least temporarily eased, as would the domestic economic agonies.

Adding to the pressures that emanate from vulnerable industry groups are the pressures for closure that the advancing processes of international interdependence generate. Nations do not want their automative, steel, and other national security-sensitive industries to be exported to more efficient foreign suppliers. On efficiency grounds it might be desirable to take advantage of

the potential gains of international trade that such openness tends to promote, but considerations of security and political sovereignty often cut in the opposite direction.

At the same time that pressures for *closure* are building in Congress, so are opposite conditions in the international system that favor moves toward true *interdependence*. True interdependence requires trade across a system displaying sufficient diversity of economic capacities to support multilateral exchanges. Such a diverse system is characterized by *broad gaps* of comparative advantage. In a system with broad gaps, each nation can specialize in particular product lines, selling off surpluses that its own industries produce most efficiently in order to earn the foreign exchange with which to import goods it needs. A system without broad gaps can hardly be expected to support a multilateral trading system.

The conditions of bipolarity were diametrically opposite to the requisite conditions of true interdependence. So long as the United States enjoyed both an absolute and a comparative advantage in producing agricultural commodities *and* consumable manufactured products *and* capital goods, its Free World trading partners could aspire to little more than positions of dependency, financed by borrowed dollars. And so long as the Soviet Union maintained something like iron political control over the Communist satellites (as it did during the early Cold War years), its clients' economies could be little more than extensions of the Council of Ministries' central plan.

But once the levelization of the superpowers' strength, relative to the strength of their clients, had transformed the postwar bipolar system into the rudiments of a true multipolar one, the preconditions for interdependence were in place. Many of the United States' trading partners today operate from the top to the bottom of the industrial-agricultural ladder. They are not just high-technology producers, or manufacturers of heavy-industrial goods, or growers of basic commodities. They are capable of doing it all, i.e., of multi-tiered specialization.

Flagging Productivity and Slowed Growth

Throughout the industrial countries, *closure* would now degrade productivity by sheltering those countries' most inefficient industries from competition. In an interdependent economic system, such industries would be forced to adjust. In some cases, excess-capacity industries would have to adjust themselves into non-existence. The irony of closure policy, of course, is that the best candidates for elimination tend also to be the most vocal claimants for protectionism. The best candidates may also be among those that are most closely identified with the nation's national security base, raising again the issue of the cross-cutting implications of economic and political-strategic factors.

It is apparently Robert Gilpin's conclusion that the claimants to closure have *already* won in Japan and the European Community. This pessimistic conclusion leads him to espouse US cultivation of a strategy of "specific (i.e., selective) reciprocity," with an emphasis on the *Pacific Basin and on a Western* Hemispheric-NIC trading region—one among several relatively closed regions. Although Gilpin is explicit that the several trading regions would adopt policies of selective—rather than total—closure, this vision still evokes memories of the old sterling-, franc- and dollar-trading communities. The Gilpin proposal would also imply slowed global growth through losses of the gains of trade. It would also imply acquiescence in Soviet-East European exclusion from a world economic system just when American observers were beginning to hope that Gorbachev might be able to lead the USSR back into a global trading system, the more so because US-Soviet economic agreements might—as Gilpin also points out—make them natural trading partners *if* an inclusive trade-promotive regime would somehow be set up.[26]

On the diplomatic front, closure would also weaken the links among the different sectors of a nation's foreign policy—links that some advocates of Presidential statecraft (most notably, Henry Kissinger) sought to use as

levers of constructive control. Kissinger believed he could exchange American trade concessions for Soviet diplomatic concessions. This tactic assumed both sides' willingness to link the commercial to the diplomatic sectors of their reciprocal foreign policies. Kissinger's scheme for a stabilized multipolar equilibrium was never realized in a satisfactory global balance-of-power system.[27] Nor did linkage work all that successfully when Kissinger tried to apply it more narrowly, as a technique of Soviet behavior modification.[28] Nonetheless, a web of multilateral economic interdependence could furnish statesmen with bargaining chips for influencing their trading partners' behavior in non-trade areas. Obversely, closure—a move away from interdependence—would weaken such linkages.

At a time of budgetary difficulty in the United States, relatively slower growth, brought on by closure, tends to shrink the tax base and crimp the rate of new investment. The President would have to propose, and Congress have to fund, a defense program on a weakened fiscal base. One would look for retrenchment or pressures to extract "more bang for the buck" from American tax dollars. During the 1950s, "more bang for the buck" pressures resulted in the adoption of massive retaliation and finite deterrence—not necessarily the most hopeful of precedents for those who seek to reemphasize conventional forces to stabilize the military balance.

Retrenchment would have a geostrategic as well as a force-posture dimension. Combining the adversarial economic policies that would characterize global closure with the narrowing of linkage opportunities and a depressed overall trajectory of economic growth, it is difficult to foresee US maintenance of the geostrategic buffers and the economic hinterland that have been critical components of the postwar strategic base. How long could Members of Congress continue to vote funds in support of US troops stationed in foreign nations which were engaged in economic warfare with their constituents' industries?

A Tilt Toward Congress

Broadly speaking, the policy issues that a move toward closure would raise tend to activate congressional involvement in the nitty-gritty of foreign policy.

As the economic pinch of slowed growth began to tighten, defense budgeting would become more legislatively politicized than it is today. Protectionism abroad would draw forth calls not only for retaliatory protectionism but also for force-retrenchments by the United States. The various forms of "Mansfieldism" (what percentage troop pullback would retaliate for jacking-up European Community tariff rates?) would gain more acceptance within Congress. Foreign commercial policy would become a primary instrument of competition among neo-mercantilistic states– a very different situation from that of coordination among the member-states of an integrated free-trade bloc.

Under article I of the Constitution, commercial policy clearly lies within the primary purview of Congress. The wording of the Commerce clause directly assigns this regulatory authority to Congress. Moreover, the nature of protectionist commercial policies –as well as of defense-budgeting—lend themselves to statutory compromise solutions hammered out in *legislative* bargaining. No political pattern has been embedded more deeply in our system than that of congressional power-brokerage in the setting of tariff policy. The persistence of this pattern is no doubt to be explained in part by the fact that commercial policy, like the appropriations process, tends to be a messy affair involving a multiplicity of highly tangible, heavily lobbied bread-and-butter interests.[29]

If "economic warfare" and tit-for-tat adjustments of tariff provisions and monetary policies were to grow in relative importance, the President would be cast less in the Commander in Chief role, and increasingly in the classic ministerial position, responsible for merely taking care that acts of Congress are faithfully executed. In a context of beggar-thy-neighbor international economic policy, the President would no doubt have to be

empowered by Congress to adjust monetary and retaliatory trade policies, probably in accord with certain more or less carefully phrased statutory criteria, as in most-favored-nation laws.

On balance, then, one might expect to associate *closure* with a tilt toward congressional activism and empowerment—a likelihood that could figure in legislators' own calculations of the relative merits of closure versus interdependence as desirable foreign policy objectives.

Implications of Deepening Interdependence

By contrast, a move toward *interdependence* might foster Presidential activism. It seems inconceivable that a global shift away from protectionism—dependent, as such a shift would be, on about-faces in the commercial policies of both the West Europeans and the Japanese—could occur in the absence of strong US Presidential leadership.[30] The odds against a general move toward interdependence are long in any case, particularly if the Soviet Council of Mutual Economic Assistance is taken to be a necessary feature of multilateralism.

Given the odds against interdependence, the thought of opening markets around the world is wishful thinking unless impressive political skills can be bent to the task by a strong President. In other words, the interdependence scenario is either irrelevant from the outset, or else it assumes US Presidential ability to take the lead internationally as well as vis-à-vis Congress—the latter, of course, helping to determine the former.

Interdependence would multiply the number of economic bargaining chips that trading partners could play when dealing with one another. But the same multiplicity of involvements and interactions would proliferate the number of points of international conflict. Consequent demands could be expected for US actions likely to *accentuate the Presidential role*.

Obversely, should Congress succeed in circumscribing a President's ability to defend multilateral interests

abroad (as in a War Powers Resolution restriction of the Navy's Persian Gulf constabulary mission), one of the essential security supports of interdependence could be undermined. One need not accept Charles Kindleberger's hegemonic theory in its entirety before agreeing that a regime of interdependence requires willingness by the more powerful regime members to maintain law and order.

The United States, then, would have to be able to defend the order of the regime—a role which immediately evokes an expectation of *executive* empowerment. Moreover, within the overall order of an international free-trade regime, a President would be expected to advance US public and private interests. Thus, in a context of an enlarging scope of American involvements the world over, a President would be expected to defend US private interests against armed assault, whether sponsored by a foreign state or by strictly private groups (e.g., non-state-sponsored terrorism) *and* would be expected to take affirmative steps on behalf of US national interests by aiding friendly foreign governments and promoting good transnational relationships generally. Given the inherent capabilities of the Executive, and the operational instrumentalities that are available to him, both as Chief Executive and as Commander in Chief, such expectations would create opportunities that a President could exploit.

A far-flung, active trading system also would imply important changes in the strategic base. Indeed, the nature of such changes would constitute a justification for an attempt to advance interdependence. The givens of an increasingly interdependent world alter its nature, from a solely military to a predominantly commercial and diplomatic base.

Inevitably, such economic interactions call for lubrication at the bearing-points of trading partners' economies on one another: economic relations call for new treaties to be negotiated and new consulates to be opened, new capital and currency-exchange markets to be developed, and new service industries—from

language-translation services to trade show managers—to be created. If there is any truth to the belief that mercantile interactions encourage a flowing of the moderate humors ("Montesquieu's *doux commerce* theory") and an ebbing of the martial spirit,[31] then a more interdependent world—especially one into which the Soviet Union was economically integrated—might be a bit less given to settlements by military means.

But—as already noted—the number of disputes themselves might be expected to increase, and in increasingly exotic locales—as all of the world-class economic competitors sought to extend their markets and their influence.[32] As interdependence widened the range and overseas locations of interests at risk, the kinds of threats that could eventuate in "incidents" and even in low-level conflicts would also increase.

Summary

Congress has traditionally recognized its own institutional incapacity to deal effectively with such problems, and has customarily equipped the President for response to rapidly changing or technically complex situations by means of legislative grants of Executive or administrative power. So, in addition to the independent constitutional powers on which a President could draw, he would probably accumulate a substantial cache of legislatively delegated powers. This accretion would be on top of the generous allotment of such powers that the post-New Deal "administrative state" and the early Cold War experience of Executive aggrandizement already have produced.

Interdependence, then, would tend to create conditions of further Presidential aggrandizement not only by way of opportunities for the exercise of constitutional powers, but also by way of statutory delegations of power. In their nature, delegations aimed at equipping the Executive to meet future emergencies would be inherently open-ended.

The similar choice facing members of the community of nations, between closure and interdependence, should be regarded as a natural consequence of the economic evolution of the postwar international system. The pressures for closure in many industrialized countries are palpable, but so is the existence of certain *economic preconditions* of true interdependence. The benefits of capitalizing on these preconditions could overbalance the *political* pressures for closure.

Obviously, the actual line of world order development for the 1990s will depend in important ways on the decisions of America's trading partners and on the progress of an "openness" program within the USSR. Decisions by US policy-makers will not unilaterally settle matters. And, surely, the ultimate resolution of forces will be a mixed one: elements and advocates of both closure and free trade will remain in the picture, with the closure vector pointing toward a contraction of the American overseas presence, and with interdependence implying an expansion of US overseas involvements in more of an economic-diplomatic than a military mode. A move in either direction could imply a significant shift in the strategic base of US security—which, because of the American role as one of the guarantors of the order of the world system, would further affect the pattern of future international relations.

Constitutional limits place no undue constraints on either the pace or direction of change, whether that direction be toward closure or toward increased interdependence. But foreign policy evolution clearly does impinge, at least at the margin, on the course of constitutional interpretation when it invites initiatives within one department which tend to enlarge its powers in a way that excites the jealousy of another department.

Closure and interdependence are both in point. When one center attempts to control a matter in execution of claimed constitutional powers, while the competing center works to control the same matter but at

cross-purposes with the objectives of the first, national disempowerment may result.

An increasingly interdependent world would be more likely to find its way back onto the global growth trajectory than would a world of closure. Under *interdependence*, however, a President might be expected to be increasingly active in the exercise of both constitutional and legislatively delegated powers. Although such a course of development would lie along the trend-line of twentieth century history, it would run counter to the efforts by Congress since the late 1960s to rein in Executive power—which is why any congressional agenda for economic closure might prevent a mustering of the bipartisan, unified political will that interdependence would require.

The balance of domestic and international political forces suggests that we must anticipate a drift toward closure. Such a move would accommodate both the realities (as some observers, such as Gilpin, see them) of the United States' trading partners' protectionist tendencies *and* the realities of US political pressures for closure.

At the margin, it would also tend to bring about the sorts of foreign policy and national security policy challenges which would support the recovery of power by Congress.

The additional motive of *executive disempowerment* cannot be discounted as a congressional factor likely to influence the future course and conduct of US security policy. Such a move, however, may not serve the long-term interests of Americans or of people around the world, either as a contribution to a more peaceful order or as a stimulus to global economic improvement.

Notes

1. Edward S. Corwin, *National Supremacy* (New York: Holt, 1913), p. 3.

2. Art. II, sec. 2, par. 2.

3. For example, conferral of judicial power on U.S. consuls serving abroad. *Ross v. McIntyre*, 140 U.S. 453 (1890).

4. Art. VI, par. 2.

5. Art. I, sec. 8, par. 18.

6. Because "executive agreements" could present an exception to this pattern of power-combining, efforts have long been underway in Congress to keep foreign affairs centered on the Treaty power rather than on independent executive branch powers.

7. See, for example, Robert S. McNamara, *The Essence of Security* (New York: Harper & Row, 1968), ch. 9.

8. Margaret Mead, *And Keep Your Powder Dry* (New York: Morrow, 1942).

9. For example, Vannevar Bush, *Modern Arms and Free Men* (New York: Simon, 1949).

10. *Ex Parte Milligan*, 4 Wall. 218 (1866).

11. N.L.R.B. v. Jones and Laughlin, 301 U.S. 1, 57 (1937); U.S. v. Darby, 312 U.S. 100 (1941).

12. Though this is not to suggest that the "threat unsought" argument was actually put forward as a Presidential theme, or that such an argument could have been ingenuously advanced. See, however, Baard Knudsen, "Europe vs. America, Foreign Policy in the 1980s," Atlantic Institute for International Affairs, Atlantic Paper No. 56 (Paris: 1984), p. 41, esp. n. 70.

13. See, for example, Richard Haass, "Congressional Power: Implications for American Security Policy," in D.J. Kaufman et al., eds., *National Security: A Framework for Analysis* (Lexington, Mass.: Lexington, 1985), p. 271 and sources cited there.

14. Ibid.

15. It has been widely reported that President Nixon—and, indeed, all of his successors—had serious doubts about the constitutionality of the War Powers Resolution, and similar reports were heard of Ronald Reagan's reservations about both that resolution and the Boland amendment.

16. See, for example, W. Arthur Lewis, *Growth and Fluctuations, 1870-1913* (London: Allen & Unwin, 1978), ch. 1.

17. Charles Lipson, "The Transformation of Trade: The Sources and Effects of Regime Change," *International Organization* 36 (Summer 1982).

18. William Branson, "Trends in U.S. International Trade and Investment since World War II," National Bureau of Economic Research (NBER) Working Paper No. 469 (April 1980).

19. See J. M. Keynes' book of that title.

20. Charles P. Kindleberger, *The World In Depression, 1929-1939* (Berkeley: University of California Press, 1973), ch. 6.

21. Joan Edelman Spero, *The Politics of International Economics* (New York: St. Martin's, 1985), p. 343.

22. C. E. Black and J. E. Helmreich, *Europe Since 1945* (New York: Knopf, forthcoming) ch. 6.

23. Paul Kennedy, "The (Relative) Decline of America," *Atlantic Monthly*, August 1987, p. 30.

24. See Paul Kennedy's review (*New York Times Book Review*, 1 November 1987, p. 11) of the most recent major contribution to this ongoing reassessment, David Calleo's *Beyond American Hegemony* (New York: Basic Books, 1987)

25. Miles Kahler, "European Protectionism in Theory and Practice," *World Politics* 37 (July 1985): 475.

26. Robert Gilpin, "American Policy in the Post-Reagan Era," *Daedalus, Futures* 116 (Summer 1987): 33, 55-56. See also Gilpin's *The Political Economy of International Relations* (Princeton: Princeton University, 1987).

27. *White House Years* (Boston: Little, Brown, 1977), pp. 651f.

28. See Bernard and Marvin Kalb, *Kissinger* (Boston: Little, Brown, 1974), pp. 102-6.

29. E. E. Schattschneider, *Politics, Pressures, and the Tariff* (New York: Prentice-Hall, 1935).

30. Of the sort suggested in the action of President Reagan, following apparently successful US-Canadian free trade talks, in challenging the trilateral allies to muster the political will needed for a further opening of the West European and Japanese markets; *New York Times*, 30 September 1987.

31. Albert Hirshman, *The Passions and the Interests* (Princeton: Princeton University, 1977), p. 60.

32. John Gaddis has made the case that an increase in US-Soviet interdependence could actually prove to be destabilizing precisely because it would provide additional opportunities for conflict to emerge; "The Long Peace: Elements of Stability in the Postwar International System," *International Security* 10 (Spring 1986): 112.

NUCLEAR DEFENSE POLICY: THE CONSTITUTIONAL FRAMEWORK

By LOUIS HENKIN
Columbia University

... it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war.
—Alexander Hamilton

NUCLEAR DEFENSE POLICY IS COMMONLY DESCRIBED AS having four elements: (1) *Declarative:* The development and articulation of policy, e.g., that certain weapons should be developed and acquired; that they should be deployed pursuant to a particular strategy; that, in the event of conventional war, nuclear weapons of certain kinds should be introduced in certain circumstances; that, in the event of a nuclear attack on the United States, the United States should launch a "second strike;" that, in some circumstances the United States should launch a first strike, to preempt an anticipated attack, or for other reasons; and that a strike should be aimed at enemy cities, or at enemy missile sites, or at other military targets. (2) *Weapons Development:* The development and acquisition of particular nuclear weapons. (3) *Deployment:* The deployment of nuclear weapons, in accordance with particular strategies. (4) *Use:* The preparation of plans for the use of nuclear weapons in different contingencies; the establishment of procedures for making decisions as to their use in particular circumstances; the decision to use nuclear weapons.

In our constitutional system, who has authority to determine and execute each of these components of defense policy?

The Original Framework

The distribution of constitutional authority in foreign and military affairs has been a subject of controversy between Congress and the President from our national beginnings. The sparse, terse, general constitutional dispositions left undecided the respective authority of the two branches in determining basic aspects of military policy even in the days of primitive weapons and simpler military deployments and strategies. For nuclear defense policy, the constitutional terminology appears wholly inappropriate, and the distribution of authority between President and Congress seems archaic. Yet, in the controversies of today, both President and Congress refer—and are compelled to refer—to the constitutional provisions.

The executive branch consists of many thousand officials. For the purposes of the Constitution, however, they are all "the President," acting in his name and by his authority. There are no clear or agreed limitations as to what the President can delegate within the executive branch, although there may be quasiconstitutional objections to Presidential delegations of some kinds of authority to persons not confirmed by the Senate.

Constitutional authority to make defense policy today is determined largely by the allocations of 200 years ago. What is explicit on the face of the Constitution has governed our way of doing things in foreign and military matters from the beginning. For our purposes, it is relevant that Congress is expressly given the power in article I, section 8:

—to lay and collect taxes to "provide for the common Defence";
—to declare war;
—to raise and support armies and to provide and maintain a navy;

—to make rules for the government and regulation of the land and naval forces;
—to provide for calling forth the militia to repel invasions; and
—to provide for organizing, arming and disciplining the militia.

Congress also has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

It is relevant, too, that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law [article I, section 9]."

In the Constitution, the powers of Congress came first and are numerous and extensive. The President's powers, in article II, are few in number. He has the power to make treaties and to appoint ambassadors and other officials, but both are subject to the consent of the Senate. In addition, the President is given one designation: He "shall be Commander in Chief of the Army and Navy of the United States." He is also assigned several tasks: "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." The designation as Commander in Chief and the Presidential tasks are not couched as powers or described as sources of constitutional authority, but they imply such powers as may be necessary (or appropriate) for carrying out those functions and tasks.

Any Presidential claim to authority in making defense policy—other than in execution of authority delegated to him by Congress—rests essentially on his designation as Commander in Chief. As an original matter, what the constitutional framers intended by that designation seems clear. If Congress raised an army and a navy, the President would command them. Whatever support and maintenance Congress provided for an army or navy

would be available to the President for such forces under his command. If Congress declared war, the President would command the army and navy in fighting the war. Presumably, it would be Congress, too, that would decide whether the war should end and peace be restored, though military armistices might be made by the President as Commander in Chief, and peace treaties could be negotiated and made by the President with the advice and consent of two-thirds of the Senate. The President could from time to time—at any time—recommend to the consideration of Congress "such Measures as he shall judge necessary and expedient," in defense as in other matters, but the decision as to whether to take those measures was for Congress.

One small footnote, which now looms very large, was dropped by the constitutional framers themselves. They had originally thought to give Congress the power "to make war;" the language was changed and Congress was given instead the power "To declare War." The record is reasonably clear that the change was made to provide for one contingency, "leaving to the Executive the power to repel sudden attacks."[1] The full implication of that change is not agreed and was perhaps not clear to the framers of the Constitution.

Original Intent and Constitutional History

The distribution of power that the constitutional framers apparently intended has not been changed by amendment, but it is difficult to recognize in that blueprint the roles of the political branches as we see them played today. It is particularly difficult to see in the constitutional text the powers of the President which, Harry Truman once said, are such as would make Genghis Khan blush with envy.

If the expressed constitutional division seems clear, much was not expressed, is not clear, and was not clear from the beginning. The President and Senate can make a treaty, but who can terminate a treaty, or exercise the prerogative of the United States (as of any state) to violate

its treaty obligations? Who has authority to make less formal agreements that do not emerge as formal treaties? And who can make the small decisions—and the larger ones—that do not take the form of an international agreement, or of a statute or Joint Resolution, but represent the attitudes and intentions we call the "foreign policy" and the "defense policy" of the United States?

Pacificus and Helvidius—Hamilton and Madison—differed sharply on those questions before the turn of the eighteenth century. To support the authority of President Washington, to proclaim, without congressional authorization, US neutrality in the wars between England and France, Hamilton argued that when the Constitution vested in the President "the Executive Power," it vested in him *all* Executive power, not merely the Executive powers enumerated in that article, subject only to such exceptions and limitations as the Constitution expressly provided. And for the framers, Hamilton said, the Executive power included the control of foreign and military affairs.

Madison—at Jefferson's instigation—lashed out at Hamilton for injecting English monarchic principles into our republican Constitution. For Madison, all national policy was to be made by Congress, except as the Constitution expressly gave some power to the President, such as the power to make treaties, but only with the consent of the Senate. The Constitution gives "all legislative powers herein granted" to Congress and to the President only "Executive power." For Madison—in the terms we would use today—Congress makes foreign and military policy as it does domestic policy; the President is required to execute what Congress prescribes.

The dispute between Hamilton and Madison has not been resolved or even addressed by the courts, the final arbiters of what the Constitution means.[2] But without judicial imprimatur, we have moved far towards Hamilton, and away from what the framers probably intended (insofar as they—whomever we include in that appellation—had any intention on the subject).

Changes from what the constitutional framers contemplated came long before nuclear weapons and nuclear defense policy. They began in the days of George Washington and have continued to this day in almost linear progression, with only infrequent reversals. Change was not limited to defense policy; it applied to foreign policy and foreign relations. The change did not affect the powers explicitly allocated, but it shaped almost everything else, the components and elements of foreign and defense policy that the framers of the Constitution did not explicitly address.

Change began because of the character of international relations and of governmental and diplomatic processes. The President had the sources of information that made him the eyes and ears of the United States. He had the experts; therefore, the expertise. He was always "in session," whereas Congress was not. The conduct of foreign affairs was not a matter of occasional formal acts such as statutes or appropriations bills, which Congress enacts formally, or treaties in which the Senate participates formally, but an informal, continuing process—much of it secret—that inevitably came largely under the control of the President and his agents. Military needs and defense strategies were determined by experts under the President's "command." Congress itself recognized the President's strengths and its own inadequacies. It acquiesced in the President's initiatives; it approved the President's recommendations; it increasingly delegated to him its own constitutional authority.

As constitutional practice took form, constitutional interpretation was not far behind. Before the eighteenth century had passed, John Marshall—while a member of the House of Representatives—declared that the President was the "sole organ of the nation in its external relations, and its sole representative with foreign nations."[3] Slowly, but steadily, Presidents began to claim that as "sole organ"—or, citing Hamilton, as "the Executive"—they could determine the policies of the United States, which they represented to the world. What is more, the

President wore his hat as "sole organ" in addition to the Commander's hat which the Constitution gave him expressly. If the President as sole organ could determine the foreign policy of the United States, the President, as Commander in Chief of the armed forces provided him by Congress, could use those forces to execute that foreign policy—as long as he did not fight a "war" without declaration or authorization by Congress.

And so, President Monroe declared his doctrine, though he did not say what the United States might do if any European power flouted that doctrine. (For decades, Congress pretended that the Monroe Doctrine did not exist or that it did not imply the threat of any action by the United States.) Presidents used the forces provided by Congress against the Indians, or against pirates, without any declaration of war or other authorization by Congress. Polk asked Congress to declare war—after (he said) Mexico had started a war against the United States—and Congress did declare war, but a few years later the House of Representatives referred to the Mexican War as "unnecessarily and unconstitutionally begun by the President of the United States."

The President has used force—in some measure—without authorization by Congress in several hundred instances, the number depending on how one defines a use of force. Congressmen sometimes objected, but formal action by Congress to control the President did not come until the War Powers Resolution of 1973, in the wake of Watergate and Vietnam. That resolution enacted requirements of consultation and reporting, and directed the automatic termination, after 60 (or 90) days, of the use of any United States forces in "hostilities" without congressional authorization. But Congress also purported to define the constitutional authority of the President:

> The Constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a

national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

The War Powers Resolution was enacted over the President's veto. Presidents continue to say that they consider the congressional prescriptions to be unconstitutional invasions of Presidential power, and Congress' definition of Presidential constitutional authority to be far too restrictive. The resolution has not been very effective, but it remains a constant congressional challenge to unilateral action by the President. At Grenada (in my view, clearly a violation of the War Powers Resolution), only quick success, low cost, and strong popular support for a popular President disarmed what might have been sharp congressional reaction.

No President has exercised or claimed power to raise an army and to provide them weapons on his own constitutional authority. But, even in the nineteenth century, it was the President—as educated by his military advisers—who recommended to Congress the weapons to be acquired. Congress was largely dependent on—and helpless before—the President's expertise. Subject to budgetary constraints, Congress generally complied when the President recommended acquiring weapons and other "Measures as he shall judge necessary and expedient."

Defense policy implicates two important distinctions applicable to constitutional jurisprudence. There is an important difference between what the President can do when Congress is silent and what he can do in disregard of the expressed will of Congress. Alexander Hamilton's appeal to Executive power, as a source of Presidential authority, was used to support the exercise of power by the President when Congress was silent. In the case of the Neutrality Proclamation of 1795, Hamilton clearly recognized that Congress could overrule a Presidential proclamation of neutrality, whether by declaring war, or by legislating on the matters implied in neutrality. Justice Jackson, in a famous concurring opinion in the *Steel Seizure Case*,[4] suggested that there is a twilight zone in

which the authority of Congress and the President is concurrent or uncertain, but he was addressing Presidential power when he "acts in absence of either a Congressional grant or denial of authority." He put in a separate category situations in which the "President takes measures incompatible with the expressed or implied will of Congress." "There," Jackson said, "the President's power is at its lowest ebb, for then he can only rely upon his own Constitutional powers minus any constitutional powers of Congress over the matter."

The powers of Congress to decide for war or peace, to tax and spend for the common defense, to raise and support armies, and to provide and maintain a navy are explicit and comprehensive; the actions by Congress pursuant to these powers are binding on the President. If there is anything in that domain that is out of bounds for Congress, it may be that which is intrinsic to the "command function" of the Commander in Chief, whatever that is. But if Congress refuses to provide weapons, the President is helpless to acquire them. And if, as a condition for providing them, Congress imposes conditions on their deployment and use, the President's power to act in disregard of those conditions is—in Justice Jackson's formulation—"at its lowest ebb."

A second distinction in general principle involves "the power of the purse." The authority to appropriate funds is in Congress, and "No money shall be drawn from the Treasury"—by the President or by anyone else—"but in Consequence of Appropriations made by Law" (article I, section 9). Effectively, this means that Congress can prevent a Presidential action by refusing to appropriate funds necessary to carry it out. The scheme of the Constitution, however, including the implications of the separation of powers, compels the conclusion that it is not legitimate for Congress to use its appropriations powers to frustrate the President's exercise of his constitutional authority; it cannot deny him funds in order to prevent him from doing that which Congress could not constitutionally forbid him to do by law or resolution. So,

for example, Congress is "constitutionally obligated" to appropriate funds to pay the President's salary, or to satisfy obligations of the United States incurred by treaty made by the President with the consent of the Senate.

On the other hand, Congress is not obliged to appropriate funds for Presidential activities that are beyond his constitutional authority. When, in the reasonable view of Congress, the President is exceeding his constitutional powers or is flouting an act of Congress that is within its constitutional power, Congress can reject the President's action by legislation or resolution (subject to Presidential veto), or by refusing to appropriate funds necessary to carry them out.

Nuclear Policy

What does the original constitutional blueprint, as modified by 200 years of constitutional-political history, imply for nuclear defense policy?

In principle, perhaps, the President can "declare" any defense policy, in the expectation—or hope—that Congress will provide the means to carry it out. The President may claim the power to carry out some or all of the declared policy on his own authority, or he may expect that Congress will authorize him to carry it out or will at least acquiesce in his doing so.

The acquisition of weapons depends on Congress, and the deployment of weapons and plans for their use depend on Congress having made weapons available. In principle, whether to have weapons, and what weapons to have, is for Congress to decide, part of its express responsibility to "provide for the common Defence," to raise and support armies and to provide and maintain a navy. Nuclear weapons, then, can be acquired only with the approval of Congress and with funds appropriated by Congress for the purpose. The President can recommend to Congress the acquisition of such weapons "as he shall judge necessary and expedient," but Congress can refuse to authorize the weapons he recommends. It can also direct him to acquire weapons he does not want, and, I

think, he would be constitutionally obliged to acquire them. (Their deployment and use may be another matter.) The President has the experts, and Congress is hard put to challenge them, but increasingly Congress has acquired experts of its own and can cross-examine those invoked by the President. By authorizing some weapons and not others, Congress can shape and sometimes determine deployment strategy and possible later uses.

The weapons that Congress provides are presumably for the President to deploy if Congress is silent on the matter. Can Congress direct the President as to whether and how to deploy them? Congress challenged the President's authority to deploy US troops in Europe during the 1950s and that issue was compromised but never resolved in principle. The issue here is whether the deployment of nuclear weapons, and the strategies that particular deployments would imply, are command decisions and, therefore, for the President as Commander in Chief. Or are they intrinsic to the power to decide for war or peace, which is a power of Congress? Perhaps these are concurrent powers in Jackson's twilight zone; if so, does Congress prevail in case of conflict?

Congress might also claim that authority to impose conditions as to the deployment and use of nuclear weapons is inherent in its power to decide to acquire those weapons. Congress could decide not to acquire any nuclear weapons; it could decide to acquire them subject to conditions on their deployment and use.

The President might deny that Congress has these powers. He might claim that developing weapons and planning for their deployment and use are command (or Executive) functions, and Congress is constitutionally obligated to appropriate funds for the President's defense policy; failure to do so would be an abuse of congressional power. Even if the President granted that Congress could properly refuse to authorize the acquisition of weapons, he would argue that Congress cannot properly use that power to impose conditions on their deployment

or use; such conditions would be unconstitutional invasions of the President's functions as Commander in Chief.

Nuclear defense policy—declaratory policy, the acquisition of weapons, their deployment, including the policy of deterrence—is decided in effect in the first instance by the President, but it depends on Congress. Congress decides for deterrence when it authorizes the weapons that will deter. It accepts a particular Presidential strategy if it provides the weapons needed for that strategy and leaves the President a free hand as to how they shall be deployed and targeted. But Congress may have authority to tell him whether or how to deploy them—and thereby determine deterrence strategy.

On the contemporary scene, some deployment decisions were perhaps implied in the North Atlantic Treaty, made by the President with the consent of the Senate. The President can properly claim from the treaty—law of the land for the United States—authority to make deployments of troops and weapons pursuant to and within the scope and spirit of the treaty, except as Congress directs him to do otherwise. Moreover, Congress has a constitutional responsibility to implement the treaty obligations of the United States. Congress, aware of the North Atlantic Treaty, of NATO, and of their implications, can reasonably be said to acquiesce in the deployments they contemplate. Repeated congressional appropriations for forces and weapons for the NATO Command also can be seen as congressional authorization for their deployments. The North Atlantic Treaty, then, provides the President with reasonable authority to deploy. But Congress has constitutional authority to determine what arms and deployments the treaty requires of the United States; constitutionally, it also has the power to decide not to carry out its NATO obligation.

Other constitutional uncertainties have also troubled defense policy (as they have other policy). The power of Congress to investigate is potentially in tension with the President's claim of executive privilege. That issue has

never been resolved in principle and has threatened constitutional crisis. In practice, however, Congress can usually obtain the information it wants, if only under injunction of secrecy. As a result, Congress can monitor the implementation of its legislation, especially at appropriation time or when the President seeks a new program or the renewal of an existing one, but how meaningful congressional scrutiny is, or can be, is debatable.

Congressional attempts to monitor implementation by various forms of legislative veto have been declared unconstitutional in principle, but some versions of legislative veto may yet survive. If Congress cannot impose the veto formally, the President may find that he has to reach some arrangement with Congress for congressional monitoring, lest Congress refuse to delegate authority to him, or do so for short periods subject to renewal only upon careful scrutiny.

Use of Nuclear Weapons

The constitutional disposition of authority in respect of "use policy" raises complex and difficult issues.

The use of nuclear weapons in declared war is determined presumably on the general constitutional principles established by the Framers, now to be applied to new situations. If Congress declares or otherwise authorizes war, the President can fight that war with any weapons Congress has provided—including nuclear weapons; what weapons are to be used in what circumstances during a declared war would presumably be a command decision for the President to make. Perhaps Congress has the power, in declaring war, to indicate that it authorizes only a non-nuclear war; if it does so, the President is bound by that limitation. (Some have argued that nuclear war is unique, so that even if Congress has declared war the President cannot use nuclear weapons unless expressly authorized to do so.)[5]

A very different question is whether, when there has been no "war," the President has authority to respond to or to anticipate a first strike. Presumably, the executive

branch has thought it best not to have public discussion of such contingencies from general considerations of secrecy in military policy, perhaps on the assumption that ambiguity will enhance deterrence. It is commonly assumed, however, that if there were a nuclear attack on the United States, the President would retaliate; his finger is on "the button." There has been little discussion of that assumption from a constitutional perspective.

The eighteenth century constitutional dispositions hardly appear appropriate to such issues. But the framers of the Constitution thought that decisions of war and peace were for Congress and that judgment is as valid today as then, and applies to nuclear war as to eighteenth-century war. In any event, the Constitution so provides, Congress continues to think so, and even Presidents have not dared challenge that constitutional principle.

A nuclear attack by the United States, whether as a first or second strike, is surely an act of war therefore within the authority of Congress, which alone has the authority to take this country into war. If the President has authority to launch such a strike it can be only because Congress delegated such authority to him; or because such authority is implied in the President's duties (and power) to carry out a treaty obligation of the United States; or because the case falls within the President's own constitutional authority, including some exception to the general constitutional disposition giving the war power to Congress. On each of these bases, it may be relevant to distinguish between a second strike designed to prevent further attacks on the United States and one to prevent an attack on our allies or between a strike the purpose of which is "to defend" the United States and one where the purpose can only be retaliation or retribution.

Congress has not expressly delegated authority to the President to launch a second strike in any circumstances. It may be argued, however, that the second strike is implicit in the policy of deterrence: by providing the weapons, Congress has approved the policy of deterrence. Has Congress implicitly approved a second strike

if deterrence fails? Some might conclude that in the light of the speculation in the literature, and discussion in congressional committees, the failure of Congress to adopt a second-strike policy and impose it on the Executive should be seen as acquiescence in a policy of concealment and uncertainty—and of leaving such decisions to the President. (The argument also might support authorization for an authentic preemptive first strike, if a strike by the enemy were reasonably anticipated.)

A different argument would justify a Presidential second strike under the exception that the framers of the Constitution apparently intended, "leaving to the executive the power to repel sudden attacks." A nuclear strike on the United States is surely a "sudden attack;" the President, then—it is argued—has the power to repel it.

What the framers of the Constitution had in mind by that exception is unknown, and two hundred years, fortunately, have provided no experience to help define that exception. It is plausible to construe it to mean this: A decision to go to war is for Congress to make. But if the United States were attacked, there would be no decision necessary. Moreover, self-defense against "sudden attack" requires prompt measures. The President need not wait until Congress authorizes him to do what is necessary "to repel" the attack; he can assume that authorization. He may proceed immediately to command whatever forces Congress had raised and supported, or the militia, if Congress had provided for calling it forth, in repelling the attack against the United States.

One may debate whether in such circumstances the President should be seen as acting under exceptional authority conferred upon him by the Constitution or by tacit authorization of Congress. It may not matter. When action is urgent, the President may act, but Congress retains its constitutional authority to regulate or terminate the action.

The exception contemplated by the framers of the Constitution applies to the nuclear strike as well but not as simply as has apparently been thought. The President

is entitled to respond to an attack on the United States if urgent response is necessary "to repel" the attack, presumably, in this context, to prevent a further nuclear attack on, or a non-nuclear invasion of, the United States. On the other hand, he may not be justified in launching a second strike on his own authority if, in the circumstances, immediate response is not necessary to prevent a further attack on the United States, so that there is time for Congress to deliberate and to act.

The constitutional framers' exception does not include authority for the President to respond to an attack on US allies. As regards response to an attack on a NATO ally, some have claimed authority for a Presidential second strike in the North Atlantic Treaty. The treaty provides (article 5):

> The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with other parties, such actions as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Article 5 imposes an obligation on the United States to "assist" any other NATO member that is the victim of an armed attack. But article 11 provides that the provisions of the treaty shall be carried out by the parties in accordance with their respective constitutional processes. That provision was inserted apparently at the insistence of the United States to assure the US Senate that an attack in Western Europe would not put the United States into War automatically, but would require a declaration of war or other authorization by Congress. It would be difficult, then, to claim that the President derives from the treaty authority to respond to an armed attack on an ally, since the treaty contemplated no such Presidential authority.

Principal arguments for Presidential power to launch a second strike depend on congressional delegation, by implication or by acquiescence. That there has been such delegation in fact is dubious. And there is serious doubt whether Congress can delegate such a war power to the President; it is even more doubtful that Congress can delegate that power without precise guidelines. Doubts grow ever graver when, as the literature suggests, authority to use nuclear weapons is in effect delegated to unknown persons to act in undefined ways in undefined circumstances, or is left not for decision by any human being but for automatic (computer) response.

Issues of delegation are aggravated by issues of Presidential succession. Some scenarios assume that the President will have ceased to be available or to be able to act, and succession to the President's constitutional power (or his congressionally delegated power) is therefore placed, in effect, in the hands of some lesser official, military or civilian. Such succession to Presidential power would take place not pursuant to the 25th amendment or any other provision in the Constitution, or pursuant to an express act of Congress, but on the basis of assumed acquiescence by Congress.

There is no basis for such delegation or succession in the Constitution. For most (if not all) anticipated contingencies, the President's authority to launch a second strike derives from Congress. It is not obvious that, by approving and supporting a a policy of deterrence, Congress has authorized the President to launch a nuclear strike on his own authority in all circumstances if deterrence fails. But Presidents—and citizens—have apparently assumed that the President would act, and continued silence by Congress in the face of those notorious assumptions would support Presidential arguments that Congress has acquiesced in, if not authorized, the strike. The result is surely not what the Constitution intended when it gave Congress—not the President—the power to decide for war or peace. Perhaps Congress does

not wish to be involved in the decision. But the responsibility is in Congress under the Constitution, and it can not delegate or abandon it.

It is not clear why Congress could not—or should not—decide now what national policy should govern in different contingencies in the event deterrence fails. At the least, Congress could decide what procedures the President should follow if in an emergency there is not time to request Congress for authorization to act. Congress could examine, *inter alia*, whether it is the case that usually there will be no time for decision by Congress. Congress could explore whether a congressional decision or at least some congressional participation, could be provided for some contingencies even if not for others. Most discussions seem to be based on the assumption of an all-out attack on the United States by the Soviet Union, but there are scenarios involving something much less, or quite different, in which assumptions about the "finger on the button" for prompt or automatic response are *not* in order.

Congressional decision, and congressional participation to the extent possible, seems essential in the spirit as well as the letter of the Constitution.

Nuclear weapons have changed the world we live in. Inevitably, they have modified the operation of our constitutional system. But they do not justify abandoning its fundamental principles. Congress has responsibility under the Constitution for the selection and acquisition of nuclear weapons. Congress also has the responsibility to decide whether and when to use these weapons in war. Such decisions were deemed too important to be left to military experts; therefore, the Constitution designated a civilian commander in chief. Such decisions also were deemed too important to be left to a single commander in chief; therefore, the war power was given to Congress. Since Congress is required to make those decisions, it should organize itself and acquire enough expertise to make those decisions intelligently, not to "rubber stamp" Executive military recommendations.

Decisions on the underlying issues that would determine the responses of the United States in particular contingencies are not emergency decisions. What kinds of responses should be made in particular contingencies implicate conceptions of national interest and national values about which the President and his advisers have no special responsibility or expertise. Congress must organize itself, acquire the expertise, pursue the study and deliberation, so that it can determine what uses of nuclear weapons might be appropriate or necessary in particular circumstances. It may be that authority to act in certain extreme contingencies when, and to the extent, strictly necessary, must be left to the President, but the decision to do so must be made deliberately by Congress.

Lawyers, even constitutional lawyers, argue "technically" with references to text and principles of construction, drawing lines, insisting on sharp distinctions. Such discussion sometimes seems ludicrous when it addresses issues of life and death and Armageddon. But behind the words of the Constitution and the technicalities of constitutional construction lie the basic values of the United States—limited government even at the cost of some inefficiency, safeguards against autarchy and oligarchy, democratic values represented differently in the Presidency and in Congress and in the intelligent participation and consent of the governed. In the nuclear age, the technicalities of constitutionalism and of constitutional jurisprudence safeguard also the values and concerns of all civilized people committed to human survival.

Notes

1. Motion by Madison and Gerry, 2 Farrand 318.

2. During the Korean war, the Supreme Court decided that only Congress, not President Truman, could authorize the seizure of steel mills in order to resolve a labor dispute. The majority of the Court said that a decision to seize steel mills was an act of legislative policy, which only Congress can do. That case involved private interests and was badly argued. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

3. Quoted with approval by the Supreme Court in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). The Court referred to the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."

4. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 647 (1952).

5. If the United States were to agree by treaty to "non-first- use," or if it were accepted that use of such weapons is forbidden by existing treaties or by customary law, the United States would be bound by that law. But the United States, like other states, has the prerogative to violate international law; the courts will not enjoin such violation.

THE WAR POWERS RESOLUTION: CONGRESS VERSUS THE PRESIDENT

By MORRIS S. OGUL
University of Pittsburgh

Looked at from the perspective of 15 years later, it [WPR] appears to be primarily a symbol of congressional insistence that Congress has the ultimate power to declare war coupled with acquiescence to the practical realities of the modern world.
—Randall B. Ripley

IN THE UNITED STATES IT IS OFTEN ASSUMED THAT THE road to erasing problems is paved with structural and legal solutions. If the budget cannot be balanced, pass a constitutional amendment requiring it to be. If the Congress is not doing systematic oversight of the bureaucracy, create oversight subcommittees. If consumption of alcohol is deemed to be evil, ban it. If the influence of organized interests is deemed to be too pervasive, require such groups to register. If the President is thought to be acting unwisely or to be abusing his powers in committing armed forces overseas, pass a law such as the War Powers Resolution providing procedures to channel his discretion and to reveal his ends and means.

In a society as optimistic as ours, problems are typically seen as having solutions. A frequent prescription is a dose of new structures or laws. If not all political problems become legal ones, some argue, many of them should. Thus, the War Powers Resolution lies in a grand tradition to problem solving in the United States.

But the quest for formalization is a symptom as well as a solution. As Hugh Heclo puts it, "formalization is a symptom of estrangement."[1] The War Powers Resolution can be seen as a sign that all is not well between the President and Congress on issues involving the commitment of US forces into combat situations. Such a conclusion offers a possibly misleading indictment. Alongside the quarrels and questioning lies a love fest. Congressional complaints pale before congressional acquiescence.

The Birth of the War Powers Resolution

Genuine and profound problems stimulated Congress to create the War Powers Resolution. The Vietnam experience seemed to show that Executive discretion would not solve the problems of how to conduct an effective foreign policy—or an accountable one. Congressional attempts to confront this dilemma were serious if not always wise. In attempting to forge the resolution, Congress had to confront policy disagreement with the executive branch, serious internal policy differences, a shortage of obvious solutions, and an absence of consensus on what to do. Some of the basic difficulties in the War Powers Resolution stem neither from congressional incompetence nor sloppy draftsmanship; they reflect the depth of the problems confronted, the shortage of solutions likely to work, and the obstacles to achieving consensus in a heterogeneous society. The Iran-contra hearings in 1987 indicated that we were not necessarily better off some 14 years later. The problems remain and ultimate solutions continue to be elusive.

Even as Members of Congress worked to fashion the War Powers Resolution, they continued to practice a long-standing deference to the Executive in the conduct of foreign policy especially in times of crisis. Senator Barry Goldwater reflected the sentiments of many, both in and out of government, when he stated, "I do not think the American people want 535 people guided by 535 different sources of strength making decisions concerning power in this country."[2] Majorities in Congress

had no desire to emasculate the President's ability to deal with foreign policy crises. What they sought was a more cooperative stance from the Executive and a more significant role for Congress. How to achieve the desired cooperation between Executive and Legislature on an enduring basis is as unclear now as it was then.

The War Powers Resolution was born in an era of policy crisis and executive-legislative distrust. Its provisions reflected the trauma accompanying its birth. Trauma elicits no single form of response. One alternative to crisis is to run from it, and some thought that Congress had done just that during the Vietnam conflict. Another response is to eliminate the problem, but that requires available solutions that no one could fathom in 1973. A third type of response is to give the appearance of grappling with the problem and emerge with a symbolic response. Both the President and Congress have been known to do that on occasion. A fourth type of response is to wrestle as best one can with problems that seem to defy creative solutions and to settle for what the need to achieve consensus will allow. The spirit of this approach was captured by one senator in October 1987 during the debate over what should be an appropriate response from the Congress to Presidentially initiated policies in the Persian Gulf:

> I suppose half a loaf is better than none: At least it can get passed, and around here there is much merit in that.[3]

Approach number four was the road taken with the War Powers Resolution. One price of this pursuit of accommodation is sometimes substantial ambiguity. Good intentions and hard work do not guarantee effective results.

The War Powers Resolution does contain ambiguities in its key provisions. Consultation is generally required, but what constitutes consultation? Hostilities are supposed to generate specified responses, but hostilities are not defined. Such ambiguities both avoid and generate conflict. They avoid conflict by making it possible to pass legislation where none could otherwise emerge from

basic disagreements, but ambiguity papers over problems. That which cannot be clearly and specifically decided can sometimes be eluded by escalating the degree of abstraction in legislation. If the language of legislation is artfully chosen, cross-purposes can be simultaneously served—or at least seem to be served.

Unfortunately, agreement through ambiguity mortgages the future. Conflicts will arise when ambiguous provisions are applied to specific situations. Here, again, the suggestion lurks beneath the surface that structural answers are possible—just take more care and write specific instructions more clearly. Such hopes ignore the basic issues that divide people and institutions. It is sometimes easier to postpone problems than to solve them. But delay must sometimes be paid for down the road. The absence of precise standards invites clashes over what is required. There is nothing like a crisis to provoke such contests.

War Powers Resolution Section Three: Consultation

Congress, in passing the War Powers Resolution, did not intend to shackle the President. Rather, the goal was to bring about some measure of congressional involvement in decisions committing US armed forces abroad. Nowhere was this objective more apparent than in the provisions about consultation in section 3. Presidential flexibility was to be protected as a necessary good. "The President in every possible instance shall consult ..." Yet Congress wanted to satisfy its yearning to be involved in decisionmaking before a policy was actually adopted to send troops into hostile or potentially hostile situations. Congress wanted to be heard. For many Members of Congress the term consultation had a clear meaning: the President would seek congressional advice and opinion.

The text of the War Powers Resolution neither precisely nor comprehensively articulated this intent. Even some basic questions were left unresolved. Who decides whether consultation is possible? With whom in Congress shall Presidents consult?

So almost immediately, controversy developed over what "consultation" required. For all Presidents over the last 16 years, "consultation" has meant "notification." After decisions had been made, or even while they were being implemented, Presidents would inform Congress about what was happening. Members of Congress regularly complained about a lack of "consultation." Presidents continued to insist that consultation had taken place. Presidents claim that they have met the requirements of the War Powers Resolution; many Members of Congress and most serious analysts continue to reject this assertion.[4] The intent of Congress was rather clear; its legislation was not.

Since Presidents have suffered no legal sanctions and almost no political ones for these acts, they have found no significant incentives to alter their behavior. Presidents defend the way they consult with two arguments: time constraints (the need for speed) and secrecy (action should precede congressional leaks). An examination of some 20 incidents where the resolution might have applied suggests the weakness of these arguments.

The absence of consultation is more a matter of choice than necessity. Presidents come to know what they want, become convinced of the necessity of their particular choices, and, at some point, do not want to hear otherwise. In the phrase "in every possible instance," Congress intended to provide for exceptions, for unusual circumstances when consultation would not be required. Presidents have converted that loophole into a decisionmaking rule. Consultation may enhance consensus, but most Presidents do not see it that way.

If consultation is not the normal practice, does that mean that section 3 of the War Powers Resolution does not make any difference? The law of anticipated reactions suggests that Presidents may indeed be somewhat more careful in what they plan and do simply because they may be called upon to explain their actions. The law of anticipated reactions seems to have some support, intuitively and empirically; nevertheless, its status remains closer to hypothesis than to demonstrated truth.

War Powers Resolution Section Four: Reporting

Presidents do report to Congress—on their own terms. Presidents have reported promptly to Congress in about two-thirds of some 20 incidents where reports might have been required under the resolution. Of these reports, only one, the *Mayaguez* incident, was explicitly based on War Powers Resolution section 4(a)(1). The Presidential pattern is to report "consistent with" the resolution. Presidents rarely report "pursuant to" it. Thus, Presidents can fulfill what they see as their political obligation and avoid the legal consequences of the resolution, for it is only a report pursuant to section 4(a)(1) that launches the 60- (90-) day time limit provided for in section 5.

On the whole Presidents have judged correctly what political comity will achieve. They report regularly as a matter of courtesy and goodwill and so they can say that they have done so. They know that majorities in Congress, whatever noises some Members make, will seldom require them to do more. The appearance of comity often brings congressional acquiescence or at least political divisions that preclude any retaliatory action. Congress does not usually respond to Presidential friendliness by trying to invoke the War Powers Resolution timetable; it grumbles but seldom sets stern requirements. Expressions of discontent provide sufficient therapy.

Presidential reports to congress after sending troops abroad: Some illustrations

Under War Powers Resolution Section 4(a)(1):	*Mayaguez* incident, 1975
Consistent with the resolution:	Lebanon, 1982 Chad, 1983 Grenada, 1983 Libya bombing, 1986
No report:	Cyprus evacuation, 1974 Korean tree cutting, 1976 Advisers in El Salvador, 1981

What judgments can we reach then about the effectiveness of the reporting requirements of the resolution?

The answer to this question depends on the standards used for evaluation. Under the resolution Presidents can report their actions under three separate sections. A report under section 4(a)(1) is required if armed forces are *introduced into hostilities* or where hostilities seem imminent. A report under 4(a)(2) is necessary if the armed forces are sent abroad *equipped for combat*. There are specified exceptions. Section 4(a)(3) reports must be made if armed forces equipped for combat are *substantially enlarged* in a foreign nation.

If the standard of effectiveness is, Do Presidents regularly report under 4(a)(1)?, the only type of report that triggers the automatic time limits of the legislation, the resolution has not succeeded. The exception was in the *Mayaguez* incident.

Starting the automatic time clock is one of the central purposes of reporting. Here the impact of the War Powers Resolution has been exceedingly modest.

By another measure, the number of military commitments followed by Presidential reports, the resolution can be judged successful. Reports were issued in two-thirds of these cases. In other words, the norm is for the President to formally notify Congress if he commits armed forces abroad under the conditions specified in section 4. Apparently, Presidents have been put on notice. Congress must be informed. Secret involvement or creeping escalation is to be avoided.

What is not clear, of course, is whether Presidents, for the same reasons that they do so now, would have generally informed Congress of these actions in the absence of War Powers Resolution requirements. The answers to this question lie buried deep within the psyches of Presidents and their advisers—a location not readily accessible to scholars or journalists.

War Powers Resolution Section Five: Time Limits

The most intriguing parts of the War Powers Resolution, section 5, dealing with the time limits and conditions under which troops must be withdrawn, have never been

used, are not likely to be used, and hence exist only as objects of speculation. Two separate provisions of the resolution are involved: (1) an automatic ending of the stay of armed forces committed abroad after 60 days (possibly extending to 90 days) under section 5(b); (2) the possibility of ending any such commitment even before 60 days if Congress by concurrent resolution decides to do so under section 5(c). These two sections provide the ultimate legal sanctions for Presidential actions that are deemed unwise or that have soured over time.

The time limit under section 5(b) has never been reached. So, we do not know what would happen at that time. It is easy to create a chamber of horrors involving some terrifying "what ifs," e.g., what if the time limit expires and the President refuses to withdraw the armed forces? Such possibilities should shake us to our constitutional and psychological cores. The best outcome might be that such occasions never arise and that we be spared answers. In the only instance where there has been any action related to this section, in 1983 Congress authorized an 18-month stay for US forces in Lebanon. These forces were withdrawn some seven months later.

In creating an automatic time limit, Congress undertook a serious self-examination that only the most brave or foolhardy attempt. Congress, recognizing that one of its primary talents is to avoid action or controversial issues in the absence of strong majorities, transformed this characteristic into a virtue. Knowing the difficulty of achieving congressional consensus on controversial issues and aware of its tendency to defer to the Executive in times of international crisis, in an act of creative genius, Congress made inaction result in action. If Congress does nothing in the 60-day period to provide affirmative support for a Presidential military commitment covered under the resolution, the armed forces must be withdrawn.

Section 5(c), providing by concurrent resolution that Congress can require the President to withdraw armed forces committed abroad, has never been used. Nor has

Congress ever seriously considered applying it. The decision by the US Supreme Court in 1983 in *INS v. Chadha*, in effect outlawing the legislative veto, made section 5(c), in the felicitous phrase of Ellen Collier, "constitutionally suspect."[5] Some observers after *Chadha* called for the President and Congress to create common sense solutions themselves. Left unanswered in these calls was the question, whose common sense?

The political potential of the concurrent resolution remains even if its status as law is questionable. Such resolutions can have political effect in pressuring the President.[6] Congressional consensus is somewhat difficult to ignore.

Discussion and Perspectives

This brief perspective on the War Powers Resolution and an overview of its actual use enables us to examine what consequences it has had. The quick and common answer is "none." We need to see if analysis leads to that or to other conclusions. Conflicting views in the form of propositions set a forum for discussion and analysis.

1. The War Powers Resolution has worked effectively.

The argument in favor of this proposition takes on a minimalist cast. Disaster has not destroyed the nation. Presidents at least go through the motions of cooperating with Congress. Presidents take heed of the War Powers Resolution by erecting legal defenses of their acts. They usually build on the Commander in Chief clause in the Constitution. Presidential reactions to the resolution have remained constant across all administrations: all seem to genuflect, at least verbally, in the direction of the resolution on occasion.

An examination of executive-legislative relations in some 20 incidents that might be covered by the War Powers Resolution offers evidence for a different conclusion. Presidents have ignored consultation provisions. The time limits and procedures in section 5 have seemed

irrelevant to events. Reports have been plentiful but have lacked substance, precision, and legal effect. Whatever success we have had in solving problems relating to military commitments abroad is essentially unrelated to the War Powers Resolution.

It is difficult to make a strong case for the overall, systematic effectiveness of the resolution. Michael Glennon argues, in fact, that the resolution has failed in creating collective executive-legislative judgment.[7]

II. The War Powers Resolution is a flawed instrument but it can be genuinely effective if the defects in its language can be rectified.

A few amendments are in order, some argue. Vagueness in key sections can be eliminated. What is consultation and who is to be consulted? can be specified. Conditions for reporting can be spelled out more precisely. Defining hostilities more clearly is possible. These proposals are attractive for they are addressed to visible weaknesses in the resolution. Whether the desired clarity and specificity can be *achieved* raises serious questions. Apprehension is surely appropriate.

The main problem is that the essence of War Powers Resolution weakness is elsewhere. Clarifying amendments might improve the working of the resolution slightly, but such amendments leave the basic problem untouched. An altered resolution will add no political incentives and the central problems are political. A revised resolution barely speaks to that realm.[8]

III. The War Powers Resolution has been a failure. It should be repealed.

Since the War Powers Resolution became law every President has regarded sections of it as unconstitutional. The Supreme Court might well agree concerning the provisions of section 5 for "required withdrawal of forces by a concurrent resolution." One Senator has called the resolution a "eunuch;" another sees it as a "nullity." One view still widely held was expressed years ago by Senator Barry Goldwater in the debates in 1972 on the resolution. Fewer share his candor than his opinion.

Senator Javits: So really you are opposed to my bill because you have less faith in the Congress than you have in the President; isn't that true?

Senator Goldwater: To be perfectly honest with you, you are right.[9]

Others are concerned with the potential dangers to diplomacy from the time limits set in section 5.

Repealing the War Powers Resolution seems very attractive to some. But what will replace it? The resolution was passed in an effort to deal with important problems that still exist. Much serious discussion and debate surrounded its passage. Returning to a legal state of nature has romantic but little historical appeal.

IV. The major impact of the War Powers Resolution has been to highlight congressional weakness.

Congressional unwillingness to invoke the resolution speaks loudly. Congress does have the tools to prod the Executive toward more effective consultation and reporting. The list of such tools is familiar: Use budgetary authority; Use bargaining chips such as support for the President's other programs and proposals; Invoke the impeachment power if the President will not follow the law. These means have always been available but have been rarely used. That is the central fact.

In the case of the War Powers Resolution, weaknesses in congressional will to act stem from attitudes of deference toward the Executive particularly in crisis situations, popular support of the President, partisan considerations, and differing opinions within Congress about the merits of each case.

Questions concerning Presidential commitment of armed forces abroad into possible hostilities highlight an alleged congressional weakness—the inability to form a clear consensus on controversial issues—and discount a genuine congressional virtue—its effectiveness as a representative body.

V. The War Powers Resolution is not very important. Its effectiveness or lack thereof depends ultimately on factors other than the legislation.

Perhaps the most appealing alternative of all has been articulated many times. It was restated by Representative Lee H. Hamilton in another context—"The best way to improve the process is with good people, not with changed structures."[10] This is a sentiment with broad appeal. How to achieve that goal is not clear.

A specific version of this sentiment is that unless we elect Presidents who believe in compromise and comity, we cannot do much about the War Powers Resolution. All Presidents believe in these things in general. That is not the problem. In crisis situations, Presidents do not seem to relate this general belief to their specific behavior. Such Presidential behavior reinforces what is by now a traditional adage: general propositions do not decide concrete cases.

Others relate War Powers Resolution effectiveness with heightened and continuing congressional attention and concern to questions of foreign policy; with more public attention to these issues; and to stopping the flow of congressional leaks of information. These issues are neither new nor unstudied. However important such perspectives and proposals may be, no one knows how to achieve them. The more one ponders these problems, the more one appreciates their depth.

VI. The War Powers Resolution has been a formal failure but a functional success.

The arguments supporting the formal failure of the resolution are impressive even if they are not totally accurate. The argument for functional success is more complex. Four points stand out.

(1) Whatever its manifest failures, the War Powers Resolution may have heightened Executive concern about what Congress will say and do. Leroy N. Rieselbach argues

> The War Powers Resolution may be more significant as a prior deterrent to precipitous or dubious armed intervention. Never entirely certain that Congress will approve

> their actions, Presidents may think twice before committing troops abroad. For example, there was widespread speculation that the Ford administration in 1974 was considering direct intervention in the Angolan civil war. The foreign policy committees of Congress ... became increasingly concerned ... that American money and weapons might escalate into military support of our favored faction. Such forthright expression of concern may well have contributed to executive caution.[11]

Some difficulties in proving the importance of anticipated reactions were mentioned earlier in this essay.

(2) The War Powers Resolution has drawn some additional attention to the importance of consensus-building for effective policy. How crucial that impact has been remains undemonstrated. But even the rationalizations from executive branch officials about why the resolution does not apply to a specific situation, e.g., the Persian Gulf in 1987, illustrate their concerns and fears about legitimacy. Presidents want to act correctly; they want to seem to be acting legally. Symbolic politics does not lack consequences.

(3) Legal levers such as the War Powers Resolution may be helpful as part of broader efforts at persuasion. The resolution may have some utility but only as part of a broader picture.

(4) The functional effectiveness, or lack thereof, of the resolution may vary with the characteristics of various situations. A determined President backed by popular support typically prevails over a divided Congress, resolution or not. The almost unseemly haste with which some Members of Congress reversed themselves to show their support of the invasion of Grenada in 1983 speaks to this point. Garry Wills makes a related point:

> As long as the President has the people behind him, he can cater to their vices. That is because the system does work—it gives the people what they want. Fooling around with the system will not much improve matters.[12]

In contrast, the withdrawal of troops from Lebanon in 1983 suggests that Presidents can sometimes be effectively pressured.

What is needed then is more attention to the conditions relating to effectiveness of the resolution. In this regard, three characteristics of a conflict situation seem useful to consider: (a) duration; (b) scope; and (c) calculations of human and financial costs. Michael Rubner argues, using similar categories, that in situations that are brief incidents with limited objectives and perceived modest costs such as Grenada and *Mayaguez*, the War Powers Resolution simply does not work.[13] In the first 16-year history of the resolution, most incidents have been of brief duration, limited scope and minor costs. Quantitatively, at least, the evidence suggests that the resolution has not been a functional success.

Can it be more successful in situations with a broader impact and with potentially higher costs? Here, the evidence is not as certain, but it is surely not encouraging. The functional success argument needs to be examined in a wide variety of contexts.

Coda

What was originally intended was that the War Powers Resolution provide a judicious marriage between effectiveness in policy and cooperation in making it. The substantial flexibility that the resolution offered Presidents would, it was hoped, enable Presidents to defend the interests of the United States as necessity seemed to demand. Hardly anyone in Congress wanted to erase Presidential discretion. The desire was to enable Presidents to do what needed to be done and yet to place effective bounds on their behavior.

If events have suggested that the goal has not been reached, the resolution still remains as a serious legal attempt to solve an enduring dilemma. What the experience with the War Powers Resolution tells us most clearly is that the problem of military commitments abroad, especially in times of crisis, will not be dealt with primarily as a legal matter.

Presidents in crisis situations seem to do what they think is best and then search for plausible arguments in

defense of their acts. The War Powers Resolution may stimulate Presidents and those around them to worry a bit more about congressional reactions to what they do—and to work harder to articulate a defense of their actions. Perhaps that is the most that can be expected.

Clear cut, effective answers remain few even if proposed solutions are many. Most offer limited prospects for success. Debates over committing US armed forces abroad expose profound difficulties in a democratic society. The War Powers Resolution is legislation with laudable objectives and flawed means. It is a classic case of the human condition.

Notes

1. "One Executive Branch or Many," in Anthony King, ed., *Both Ends of the Avenue* (Washington: American Enterprise Institute for Public Policy Research, 1983), p. 41.

2. *Congressional Record*, (Daily Edition), June 6, 1985, S 7609.

3. Quoted in the *New York Times* (National Edition), October 21, 1987, p. 6.

4. Some useful scholarly analyses are Michael J. Glennon, "The War Powers Resolution Ten Years Later: More Politics Than Law," *American Journal of International Law* 78 (July 1984): 571-81; Michael Rubner, "The Reagan Administration, The 1973 War Powers Resolution, and the Invasion of Grenada," *Political Science Quarterly* 100 (Winter 1986-86): 627-47. Daniel Paul Franklin, "War Powers in the Modern Context," *Congress & the Presidency* 14 (Spring 1987): 77-92.

5. "The War Powers Resolution: A Decade of Experience," Congressional Research Service Report, 84-22F, p. 10.

6. Glennon, *American Journal of International Law*, p. 577.

7. Ibid., p. 571.

8. Ibid., p. 580-1. He looks to altered political climates when such amendments would be helpful. It is not easy to see the conditions under which this suggestion would be practicable.

9. *Congressional Record* (Daily Edition), June 16, 1977, S 9950.

10. "The Constitution and Foreign Policy," *Presidential Studies Quarterly* 17 (Summer 1987): 457.

11. *Congressional Reform* (Washington: Congressional Quarterly Press, 1986), p. 96.

12. *New York Times*, 18 November 1973, section 7, p. 22.

13. *Political Science Quarterly* 100 (Winter 1985-86): 645.

NATIONAL SECURITY AND THE UNITED STATES JUDICIARY

By C. HERMAN PRITCHETT
University of California, Santa Barbara

With all its defects, delays and inconvenience, men have discovered no technique for long preserving free government except that the executive be under the law and that the law be made by parliamentary deliberations.

—Justice Jackson

THE SUPREME COURT OF THE UNITED STATES, IN CASES or controversies properly brought, is permitted or required to express its views on the powers granted and the restrictions imposed by the Constitution on the President and Congress in the conduct of American foreign relations. The lower Federal courts have the same opportunity and obligation. The Constitution grants such powers and allocates them among the branches of the government. The President is Commander in Chief of the armed forces, Congress is given the power to declare war, the Senate ratifies treaties by a two-thirds vote.

The courts, by contrast, have no special role in foreign affairs—only their normal authority to decide cases or controversies which meet established standards of justiciability. However, this authority includes the right to interpret constitutional powers and limitations and to announce and enforce constitutional limitations on the Executive and Congress. By the same token, judicial rulings may provide historical or theoretical justifications for actions by one or the other of the political branches. The

intention is that the rule of law is to be applied even in the dangerous and threatening field of foreign relations.

The Political Question Doctrine

The Supreme Court recognized early its limited role in dealing with foreign policy issues. In *Foster v. Neilson* (1829), the Court refused to rule on the location of a boundary line between Spain and the United States established in 1804, because this was "more a political than a legal question," and one in which the courts must accept the decisions of the "political departments."

The political question was not limited to the decision of foreign relations issues. In *Luther v. Borden* (1849), the Court invoked it to avoid enforcement of the republican guaranty provision of article IV. The Court in *Coleman v. Miller* (1939) declined to take responsibility for deciding what was a "reasonable" length of time for a *proposed* constitutional amendment to remain before State legislatures for ratification. In *Colegrove v. Green* (1947) the Court, through Justice Frankfurter, ruled that disputes over apportionment and redistricting State legislatures were to be refereed by Congress and not the courts.

In 1962, when in *Baker v. Carr* a different Court majority reversed *Colegrove*, Justice Brennan undertook to clear up what he felt was misunderstanding of the political question doctrine. "Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." In particular, he found that there had been "sweeping statements" in past Court decisions "to the effect that all questions touching foreign relations are political questions."[1] But, he continued, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."

The political question rule must be construed in situational terms. Some situations, Brennan noted, do require judicial abstention because they demand a "single-voiced statement of the government's views." He provided examples. Ordinarily a court will not inquire whether a treaty has been terminated.[2] Recognition of

foreign governments also defies judicial treatment. The judiciary follows the Executive as to which nation has sovereignty over disputed territory.[3] Recognition of belligerency abroad is an Executive responsibility. It is the executive branch that determines a person's status as representative of a foreign government.[4] The Supreme Court has refused to review the determination of the political departments as to when or whether a war has ended. Presidential decisions approving awards of foreign air routes by the Civil Aeronautics Board are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility, and which have long been held to belong to the domain of political power not subject to judicial intrusion or inquiry."[5]

The attributes of political questions, Justice Brennan concluded in *Baker v. Carr*, "in various settings, diverge, combine, appear, and disappear in seeming disorderliness." Many other analysts and scholars have undertaken to rationalize the political question doctrine. Herbert Wechsler thought that judicial abstention from the decision of constitutional issues was justified or required only when "the Constitution has committed the determination of the issue to another agency of government than the courts."[6] Alexander Bickel traced the doctrine to "the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from."[7] Louis Henkin thought the doctrine was simply "the ordinary respect which the courts show to the substantive decisions of the political branches." He went on to say,

> The Constitution has not made the courts ombudsmen for all legislative inadequacies in all seasons, and they cannot supply an effective remedy for all ills. These limitations on the judicial role do not depend on some extraordinary doctrine requiring the courts to abstain in some special package of cases.

The role of the courts and the institution of judicial review, Henkin suggested, might "fare better if we broke open that package, assigned its authentic components elsewhere, and threw the package away."[8]

Edward S. Corwin attributed judicial abstention to respect for the President and a desire to avoid embarrassing clashes with executive authority. As he says,

> While the Court has sometimes rebuffed presidential pretensions, it has more often labored to rationalize them; but most of all it has sought on one pretext or other to keep its sickle out of this "dread field."

Corwin went on to note that the tactical situation makes successful challenge of the President somewhat more difficult than one against Congress, for "the Court can usually assert itself successfully against Congress by merely 'disallowing' its acts, whereas Presidential exercises of power will generally have produced some change in the external world beyond ordinary judicial competence to efface."[9]

President Versus Congress

The political question doctrine is particularly attractive to judges when it enables them to avoid dealing with a conflict between the President and Congress. The Supreme Court is appropriately reluctant to get involved in the cross-fire of its coequal partners. In fact, this prospect has so disturbed Jesse H. Choper that he would have the courts flatly reject all lawsuits involving congressional-Executive confrontation. His "separation proposal" would completely bar the Federal judiciary from deciding "constitutional questions concerning the respective powers of Congress and the President vis-a-vis one another."[10]

Choper argues that the political branches have adequate powers to protect and defend their positions in any inter-branch controversy, and that "the participation of the Supreme Court is unnecessary to police constitutional violations by one political department against the other."[11] Consequently, he would hold all such controversies to be "non-justiciable, their final resolution to be remitted to the interplay of the national political process."[12]

Obviously, the political question doctrine does not go this far. Nor is it necessary to do so, for there are other methods of judicial evasion available. At the Supreme Court level, access can be denied by rejection of certiorari, with no explanation whatever. And, of course, judicial access at any level requires the establishment of standing.

In the *Columbia Law Review*, Jonathan Wagner argues the case for the standing test as against the more amorphous political question doctrine.[13] Two conflicting concerns must be harmonized when Members of Congress seek to take disputes with the executive branch to court. On the one hand, legislators are attempting to curb executive action that arguably exceeds constitutional or statutory authority, and encroaches on legislative power. Suits may be brought on issues that otherwise would be unreviewable for lack of any other possible plaintiff.

On the other hand, serious separation-of-powers problems accompany any mediation by the judiciary of disputes between coordinate branches of government. By reason of these conflicting interests, Wagner believes that the courts have been unable to articulate a consistent, coherent standard by which to determine when Members of Congress should be allowed to sue. He would apply the well-recognized standing tests, with the requirement of injury. Members of Congress could seek redress to injury of their right as legislators to vote on matters constitutionally consigned to the legislative branch, and individual members could be allowed to sue to redress injuries to Congress as a whole.

For congressional experience with suits against the executive branch, we turn first to legislative reaction to the controversial Panama Canal Treaty. President Carter secured Senate ratification for the treaty, which provides for turning the Canal over to Panama by the year 2000, on 16 March 1978 by a margin of one vote. Five Members of Congress and four states filed suit in the original jurisdiction of the Supreme Court, arguing that under article IV, section 3, the disposal of US property required

joint approval of the two Houses rather than treaty ratification by a two-thirds vote of the Senate. The Court rejected the suit in *Idaho v. Vance* (1978) without opinion.

Shortly thereafter, President Carter and Members of Congress had another confrontation on a treaty issue. As a necessary step in the extension of diplomatic recognition to the People's Republic of China, the President terminated the US treaty with Taiwan under a procedure authorized by the treaty. Senator Barry Goldwater and other Senators and Representatives sued in the Federal district court of the District of Columbia to rescind the action, alleging that since the 1954 pact with Taiwan had been ratified by the Senate, the President could not terminate it without Senate approval, or possibly the approval of both Houses.

Judge Gasch in the district court initially held that Goldwater lacked standing, but after an unofficial sense-of-the-Senate vote had supported Goldwater's claim, he reconsidered and ruled that Congress had an "implied" role in treaty termination. Presidential termination of treaties without Senate or congressional concurrence, he asserted, would violate the President's constitutional obligation to take care that the laws be faithfully executed.[14]

The court of appeals granted Goldwater standing but reversed the district court as to the Senate's role in abrogation. A badly divided Supreme Court vacated the appellate judgment and directed the district court to dismiss the complaint. Rehnquist, for four justices, invoked the political question doctrine. Justice Powell concurred in the result for a fifth vote, but on ripeness grounds; he believed that the political branches had not reached a "constitutional impasse."[15]

In *Holtzman v. Schlesinger* (1973), Congresswoman Holtzman and other Members of Congress brought an action asking that the bombing of Cambodia be enjoined, contending that by ordering the bombing President Nixon had impaired the right of Congress to declare war. The court of appeals rejected the suit on standing grounds:

> She has not been denied any right to vote on Cambodia by any action of the defendants. She has fully participated in the Congressional debates The fact that her vote was ineffective was due to the contrary votes of her colleagues and not the defendants herein.[16]

In the meantime, Congress had undercut Holtzman's suit by authorizing a 45-day extension of the bombing. In neither *Goldwater* nor *Holtzman* was the President acting against the express wishes of Congress.

In 1982, 30 members of the House of Representatives challenged the legality of the United States presence in and military assistance to El Salvador. They contended that US military officials had been introduced in situations where military action was clearly indicated, in violation of the War Powers Resolution. The district court held this to be a nonjusticiable political action, pleading that a district judge lacked the resources or the expertise to pass on such claims. The court of appeals likewise rejected the suit, but Judge Robert Bork preferred to base the decision on the issue of congressional standing, which he undertook to clarify. Only "a nullification or diminution of a congressman's vote," he ruled, could constitute requisite injury-in-fact to justify standing to sue. The Supreme Court declined review.[17]

In *Sanchez-Espinosa v. Reagan*, 12 Members of Congress, along with certain US citizens and residents of Nicaragua, contended that Congress had been deprived of its right to participate in the decision to declare war on Nicaragua, and that the Boland amendment prohibiting support of the contras had been violated. The district court dismissed all the Federal claims as raising nonjusticiable political questions. The court of appeals agreed, adding that the Boland amendment had been included in an appropriation act that had expired on 30 September 1983, and consequently the issue was moot.[18]

Commander in Chief and the War Power

The grant to the President of power as Commander in Chief, wrote Alexander Hamilton in No. 74 of

Federalist, required little explanation. It would amount, he said in No. 69, "to nothing more than the supreme command and direction of the military and naval forces, as the first general and admiral of the Confederacy," while the more significant powers of declaring war and of raising and regulating fleets and armies were exercised by Congress.

Actually, the President's power as Commander in Chief has been transformed from simple military command into a vast reservoir of indeterminate powers in time of war or emergency, which the judiciary is reluctant to examine or control. As Louis Fisher says, "Conflicts between Congress and the President over the war power are generally examined by the judiciary at a safe distance; it is intensely interested, but in no mood to intervene."[19] Summing up his study, *The Supreme Court and the Commander in Chief*, Clinton Rossiter concluded that the Court had been asked to examine only

> a tiny fraction of [the President's] significant deeds and decisions as commander in chief, for most of them were by nature challengeable in no court but that of impeachment.... The contours of the presidential war powers have therefore been presidentially, not judicially, shaped; their exercise is for Congress and the people, not the Court, to oversee.[20]

Congress has in fact often sought to parlay its control over funds and its war declaration power into some measure of control over Executive military activities. A prime example is found in the troubled relations between Congress and two Presidents over the undeclared war in Vietnam. Initially, Congress supplied support for the hostilities by adopting, at President Johnson's insistence, the Gulf of Tonkin Resolution. Subsequently, Assistant Secretary of State Katzenbach told the Senate Foreign Relations Committee that the resolution gave the President as much authority as a declaration of war. He alarmed the Senators by referring to declarations of war as "outmoded," and contended that a declaration would not "correctly reflect the very limited objectives of the

United States with respect to Vietnam."[21] Efforts by members and committees of Congress to recapture some control of the war-making power resulted in such measures as banning the use of funds, repealing the Tonkin Resolution, and ordering the bombing of Cambodia stopped.

While Congress *did not*, "the people" (to quote Rossiter) *did* go to court to challenge the validity of the congressionally undeclared war in Vietnam. Though all these efforts were unsuccessful, four justices of the Supreme Court would in one case or another have granted review. In *Massachusetts v. Laird* (1970), the Massachusetts legislature had passed a law authorizing the State's servicemen to refuse to take part in armed hostilities in the absence of a declaration of war by Congress. The attorney general of the State was directed to seek an injunction forbidding the Secretary of Defense to send any citizen of the State to Vietnam unless Congress had declared war. The Supreme Court denied the State's motion to file the suit.

A suit to enjoin the spending of funds on American military operations in Vietnam, *Sarnoff v. Shultz* (1972), was rejected as presenting a political question, but Douglas and Brennan thought it was a spending issue that might be litigable under the doctrine of *Flast v. Cohen* (1968). In *Katz v. Wyler* (1967) and *Mitchell v. United States* (1967), the Court unanimously rejected claims that the Vietnam operations amounted to a war of aggression outlawed by the Treaty of London.

The War Powers Resolution

Congressional frustration over inability to effect control over the Vietnam hostilities eventually motivated adoption of the War Powers Resolution, enacted in 1973 over President Nixon's veto. While President Nixon condemned the resolution as unconstitutional and a dangerous restriction on the power of the Commander in Chief to meet emergencies, some Members of Congress

voted against it on the opposite ground that, in fact, it recognized the President's right to start a war.

The War Powers Resolution has been controversial and generally ineffective. As the situation in Vietnam was collapsing in April 1975, President Ford felt obliged under the act to ask Congress for authority to use troops to evacuate American citizens and dependents from Saigon. However, the situation deteriorated so rapidly that the legislation was not needed and was not adopted. When the American merchant vessel *Mayaguez* was seized by Cambodian naval forces in May 1975, President Ford notified congressional leaders only after military action had been taken.

Similarly, when President Reagan sent Marines into Lebanon in the fall of 1982, he reported the action to Congress as a matter of information, not in compliance with the resolution. Though 10 Marines died in a 20-day period under continuing hostile fire, the Reagan administration contended that the "hostilities" test had not been met.

President Reagan gave leaders of Congress notice of the 1986 raid on Libya three hours before the bombing started. Five days after US forces landed in Grenada in 1983, the Senate voted 64 to 20 to declare that the resolution applied. The House likewise voted 403 to 23 that the act applied and the troops must be withdrawn within 60 days unless an extension was granted. The same week Reagan announced that withdrawal had begun.

After the Reagan administration began extensive naval military involvement in the Persian Gulf to guarantee the safety of oil transport, 114 members of Congress filed a lawsuit asking the Federal district court in Washington to direct the President to comply with the reporting requirements of the act. Secretary of State Shultz responded that the United States had no intention of getting into a shooting war in the Gulf, and did not intend to invoke the War Powers Resolution.

Fourteen years after its adoption, no President has recognized the constitutionality of the War Powers

Resolution. Controversy over the legitimacy and the application of the Resolution in the Persian Gulf situation continues. Congress has been reluctant even to consider its only effective means of enforcement, the cutting off of funds.

The resolution authorizes Congress to override Presidential commitment of troops abroad by concurrent resolution, or "legislative veto." The legislative veto is a common congressional device for retaining some measure of legislative control over powers delegated to executive agencies, by authorizing one or both Houses of Congress by simple majority to veto specific administrative actions. While the Supreme Court has had no occasion to pass on this or any other feature of the War Powers Resolution, it did rule, in *Immigration and Naturalization Service v. Chadha* (1983), that a concurrent resolution, like other legislation, must be submitted to the President for approval or disapproval, with a two-thirds vote of each House required to override a Presidential veto.

It is by no means clear, however, that *Chadha* invalidates the concurrent resolution provision in the War Powers Resolution, for in this statute there has been no legislative delegation of power to the Executive. In fact, the situation is reversed, for Congress has the constitutional power to declare war, and the concurrent resolution is intended to override unauthorized Presidential use of military force. In view of judicial reluctance to be drawn into litigation of such issues, however, the legitimacy of the concurrent resolution is unlikely to be tested. As a practical matter, any President confronted with a concurrent resolution ordering him to bring troops home from a foreign venture would be unlikely to rely on *Chadha*.

The President as "Sole Organ"

Thus far, we have seen how generally successful the Supreme Court and lower courts have been in avoiding

the arbitration of direct Executive-legislative foreign policy disagreements, or the setting of limits on Executive or legislative powers in this area.[22] However, it is always possible for substantial foreign policy constitutional issues to be raised in private litigation or by law enforcement proceedings which can elicit relevant rulings from the Court.

One of the most important judicial pronouncements concerning the President's powers in the field of foreign relations was delivered in *United States v. Curtiss-Wright Export Corp.* (1936). An American company had been charged with selling arms and munitions to a foreign country in violation of a Presidential embargo proclamation issued under general congressional authorization. The issue raised was whether the authorization amounted to an unconstitutional delegation of legislative power to the President. The Court had recently held congressional delegations to the President in domestic affairs to be unconstitutional.[23] But the Court in *Curtiss-Wright* approved the delegation as justified by the special role of the President in the conduct of foreign affairs. In a pregnant phrase, Justice Sutherland depicted the President as "the sole organ of the federal government in the field of international relations."

During the Iran-contra affair and before the special congressional committees, supporters of the diversion of funds to the contras argued that this pronouncement gave the President "sole" power to authorize aid to the contras, and rendered unconstitutional the Boland amendment forbidding such aid.[24] Widely varying opinions have been expressed on this issue, but it seems probable that no judicial ruling will be secured unless and until the independent counsel investigating the Iran-contra affair brings a proceeding of some kind against National Security Council officials or others for violation of the Boland provisions.

In that event, *Curtiss-Wright* would be a very weak reed on which to lean. The Supreme Court has never overturned an act of Congress as an unconstitutional

interference with the President's foreign relations role, while it has invalidated action taken under Executive authority which violated a congressional statute.[25] Sutherland's phrase, "sole organ," is in fact dictum,[26] and *Curtiss-Wright* says nothing about who is to make foreign policy, as opposed to who is to execute it. The Court has repeatedly recognized the power of Congress to regulate at least some areas of foreign affairs, and article I specifically grants Congress power to "regulate commerce with foreign nations." In *Perez v. Brownell,* (1958) the Court, upholding a statute on loss of citizenship, said, "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the lawmaking organ of the Nation."[27]

The Presidential "sole organ" theory, moreover, must deal with the holdings in the *Steel Seizure Case,*[28] arising out of President Truman's Executive order seizing the nation's steel mills in 1952 to safeguard continued delivery of munitions to American troops in Korea. Justice Black in his opinion for the Court brusquely rejected the notion that the President's action, unauthorized by statute, might be sustained "as an exercise of the President's military power as Commander in Chief of the Armed Forces." He continued, "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."

Many commentators have found this analysis rather primitive. But Justice Jackson's much more sophisticated and highly praised concurring opinion in *Youngstown* is no more supportive of the Presidential position. Jackson wrote,

> Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.... When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.... Presidential claim to a power at once so conclusive and preclusive must be

> scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

There may be problems of statutory interpretation with the Boland amendment, such as whether the language applied to the National Security Council staff, but that it was a constitutional exercise of congressional power seems clear.

Summary

Judicial review (or its denial) has unquestionably tended to support the Executive role in the field of foreign affairs at the expense of congressional power. The *Curtiss-Wright* dictum has been widely alleged to establish the President as the "sole organ" in foreign policy. The spending power of Congress has a firm constitutional foundation, yet the Boland amendment has been alleged to interfere with the President's sole power to conduct foreign relations and to constitute "micromanagement" of foreign policy.

Congress attempted to recapture its power to declare war by adopting the War Powers Resolution, but no President has recognized it or complied with it. Moreover, effectiveness of the statutory plan may be limited by the Supreme Court's invalidation of the legislative veto, while efforts by individual members of Congress to secure judicial enforcement of the resolution's requirements have been uniformly rejected for lack of standing.

Congressional declarations of war are out of fashion. The nation's nuclear defense policy to "launch on warning" obviously precludes any opportunity for a declaration of war by Congress, and a challenge to the policy in Federal court has been dismissed on political question grounds. The Senate retains its power to ratify treaties, but the Reagan administration's effort to reinterpret the 1972 Anti-Ballistic Missile Treaty to permit testing in the atmosphere was resisted in the Senate not by judicial action but by Senator Nunn's old-fashioned power play.

Notes

1. Citing Oetjen v. Central Leather Co. (1918).

2. Terlinden v. Ames (1902).

3. Foster & Elam v. Neilson (1829).

4. Ex parte Hitz (1884).

5. C. & S. Airlines v. Waterman S.S. Corp. (1948).

6. "Toward Neutral Principles of Constitutional Law," 73 *Harvard Law Review* 1, 9 (1959).

7. "The Supreme Court, 1960 Term—Foreword: The Passive Virtues," 75 *Harvard Law Review* 40, 75 (1961).

8. "Is There a 'Political Question' Doctrine?" 85 *Yale Law Journal* 597, 624-25 (1976).

9. Edward S. Corwin, *The President: Office and Powers*, 4th rev. ed. (New York: New York University Press, 1957), p. 16.

10. Jesse H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980), p. 263.

11. Ibid., p. 275.

12. Ibid., p. 263.

13. "Congressional-Plaintiff Suits," 82 *Columbia Law Review* 526 (1982).

14. Goldwater v. Carter, 481 F.Supp. 949 (1979).

15. 617 F.2d 697 (1979), 444 U.S. 996 (1979).

16. 484 F.2d 1307 (1973), cert. den. 416 U.S. 936 (1974).

17. Crockett v. Reagan, 558 F.Supp. 893 (1982); 720 F.2d 1355 (1983); cert. den. 467 U.S. 1251 (1984).

18. 568 F.Supp. 596 (1983); 770 F.2d 202 (1985).

19. Louis Fisher, *The Constitution Between Friends: Congress, the President, and the Law* (New York: St. Martin's Press, 1978), p. 241.

20. Clinton Rossiter, *The Supreme Court and the Commander in Chief* (Ithaca, N.Y.: Cornell University Press, 1951), p. 126.

21. C. Herman Pritchett, *Constitutional Law of the Federal System* (Englewood Cliffs: Prentice Hall, 1984), p. 322.

22. Louis Fisher, "Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case," 45 *Public Administration Review* 705 (1985).

23. Panama Refining Co. v. Ryan (1935); Schechter Corp. v. United States (1935); Carter v. Carter Coal Co. (1935).

24. There were in fact several Boland amendments, attached to general appropriations acts, but the most restrictive, adopted in 1984 to be effective during the 1985 fiscal year, provided that "no funds available to the Central Intelligence Agency, the Department of Defense or any other agency or entity of the United States engaged in intelligence activities" should be used to support military operations in Nicaragua.

25. Little v. Barreme, 2 Cr. 170 (1804).

26. The phrase, "sole organ," was used by John Marshall when he was a member of Congress, in defense of President John Adams who, pursuant to a treaty, had turned over to Britain an individual wanted for murder.

27. While the provision sustained in *Perez* was overruled in Afroyim v. Rusk (1967), the passage quoted was not challenged.

28. Youngstown Sheet & Tube Co. v. Sawyer (1952).

THE CONSTITUTIONALITY OF STRATEGIC PLANNING

by GEORGE H. QUESTER
University of Maryland

Neither foreign policy nor military operations can be commanded by 535 members of Congress.

—Gerald Ford

THE AMERICAN PATTERN OF PLANNING, OR LACK OF PLANning, for the possibility of war has to be related to two major background factors: the *external situation* the country has faced and the *domestic* constitutional and political practices we have developed. Has our historical success at home translated into any preparation for heading off disasters abroad—the very worst disaster being a military defeat and conquest by a foreign power? Students of realpolitik would be quick to remind us that nothing has posed so final a threat to other constitutions and liberties and independent political arrangements abroad as the occupation by a foreign armed force.

Americans, as they look back on the workings of the Constitution, also look back fondly on the opportunities for isolation. The width of the Atlantic Ocean offered us a natural exemption from preparations for war. One of the questions we have to consider is whether this nostalgic memory of a geograpically provided solution to the strategic-planning problem is not misleading. We remember the phrase from George Washington's farewell address where he warned against "permanent alliances," but we often do not consider the context and the complications of this phrase.[1]

We less remember that we entered another war with Britain within a quarter century, and had to tip-toe throughout relations with the French and the British. The European powers were at war most of the time, and were interfering with American commerce on the high seas. Could these really have been years in which no one in the US Government was considering how wars would be fought, or alliances handled, if we were to be pulled into them?[2]

Let's consider what people had to be thinking as they celebrated not the first two centuries of their US Constitution, but simply the first two or three decades. If, in later years, the United States regarded itself as bound by the Constitution and tradition to stay away from any advance preparations for wars, what time period would one choose for the foundation of such traditions?

Just as there had to be some advance thinking (strategic-planning) in the US Government before the US declaration of war against Britain in 1812, and in the undeclared naval war with France from 1798 to 1800, so there had to be some such planning before the Mexican War. And so again before the declaration of war on Spain in 1898. One of our tasks will be to compare the substance and styles of these earlier episodes of war planning, for what they show us about our traditions in political practice, and for the accumulated influence this has brought to the twentieth century.

Woodrow Wilson is reported to have tried to prevent the Army War College, housed at today's Fort McNair, from developing contingency war plans while the United States was still neutral during World War I.[3] What had there been about the total of American history to that point, and the total of the American constitutional tradition, that led President Wilson to issue his order that such war planning be stopped?

The First Three Decades

As we look back on the impact of our constitutional tradition after two centuries, we may succumb to a

tendency to see it as all of one piece. Yet, it might be proposed here that we have rather gone through several discrete bursts of experience, each in light of what had gone on before.

What was the world outlook of colonial Americans when they were still under British rule? Could they have been included toward an isolationist or a very high-minded outlook on foreign policy, when they were still constantly threatened by French and Spanish colonial outposts, and continuously shaken about by the wars of Europe? Americans got away with a great deal of self-government and individual freedom in those years, with primacy attached to individual liberty and to the rights of local government. Our attitudes surely stem out of that period, explaining the restrictions placed on central government in the Articles of Confederation, and later in the US Constitution. Yet these were also years in which the protective services of the British Navy and Army were often most welcome, and when all the colonies saw a need to maintain local militias, typically based on compulsory rather than voluntary service.[4]

The years immediately after the American Revolution reflect the juxtaposition of the demands of individual freedom with the demands of national sovereignty. The US Constitution's provisions on war planning and war waging ultimately are the product of this dialectic.

The United States in 1787 was, after all, only some four years free of the Revolutionary War. Passionate opponents of the possible tyranny of a central government had imposed all the limits of the Articles of Confederation, but the realities of international relations quickly played an important role in leading the delegates in Philadelphia to move away from the Articles. As a most serious illustration of this, the individual States had utilized their freedom under the Articles to fail to fulfill the obligations the United States had assumed in the peace treaty with Britain, most importantly on compensation for property seized from Tory loyalists to the crown. The British, wise in the ways of the world, followed the simple

maxim of "Don't get mad, get even," holding on to frontier posts in the Northwest Territory (something London was not unhappy to find an excuse to do, since such garrisons, in collaboration with the Indian tribes, might yet keep the lands west of the Appalachians from coming under a true and permanent US sovereignty).[5]

The deliberations of 1787 amounted to a necessary compromise between the desires Americans felt for the retention of domestic liberties, and their awareness of the difficulties of the international military arena. The United States was indeed to be burdened by such concerns about international threats at least until 1815. The War of 1812 was seen by many as "the second war of American independence."[6]

1814 is the only time in history when our government under the US Constitution had to flee from its base in face of a foreign enemy. One could hardly, therefore, imagine someone claiming in 1816 that the *traditions* of the US Constitution made it wrong and immoral for anyone in Washington to be thinking about future wars, to be mapping out contingency plans or to be considering which side might be best to join, in terms of American interests.

We remember the United States declaring war on Britain in 1812 mainly over issues involving the high seas, i.e., the impressment of American sailors into the British Navy, and the interference with American commerce. More than a century later, this might have come to seem like a relatively peripheral set of issues, as the United States did not stand up for such a right (to extend maritime commerce everywhere) in the 1930s when it passed the Neutrality Acts to keep American merchant shipping out of war zones in the future.

Yet the United States, in the first few decades of its independence, may have had need of the high seas even more than it would in the 1930s. Much of its internal trade had to be carried by coastal trading vessels, ships which were being stopped and searched by the British Navy. After the cutting off of trade with the British

mother country in the achievement of independence, Americans had thereafter depended on building effective trading linkages with other partners, on the continent of Europe, and in the Far East.

The nature of the essential American interests that Presidents Washington, Adams, Jefferson and Madison had to seek to defend, produced some complicated, and not very successful, strategic planning. To force the British Navy to cease to harass American shipping would not be an easy task, given the preponderance of British seapower after Trafalgar. One level for accomplishing this might be at hand in a land force movement into Canada, a move which (given the small size of the British garrison north of the Great Lakes) might well have seemed feasible. Yet this was the application of offensive military vehicles for what was to be regarded as a defensive goal, catching many Americans already in a bothersome contradiction.

For some, the way out of such contradiction was to refuse to commit State militia forces to any active operations across the pre-existing national boundaries. Another way out of the contradiction was more popular in the territories west of the Appalachians, the territories still so much bothered by the Indian raids encouraged and supported by the British; this was to convince one's self that the Canadians were being held involuntarily under British colonial rule, as 1812 might now at last see the fulfillment of what had been a failed attempt at Canadian liberation in 1776.

The result of this blend of conflicting attitudes and motivations was that the United States took the land offensive into Canada at what were strategically the wrong entry points, crossing into Ontario opposite Detroit and Niagara Falls (rather than moving up from Lake Champlain to seize Montreal, thus to cut off all British naval and land reinforcements to the Great Lakes area). Since the States of the West were more willing to commit themselves to the war than the New England States the "war planning" of 1812 hardly emerged coherently.

If one sees the American side of the War of 1812 as badly planned, this is plausible enough, alongside the many instances when it was badly fought. It would be a mistake, however, to read this yet as part of constitutional *spirit* or *tradition* that forbade strategic planning. Not only was the Constitution too new a document to be assigned such a reverence for tradition, America had not yet acquired the military elbow-room to allow many people to be opposed to war planning on principle.

The *letter* of the Constitution, hammered out as a compromise in 1787, had made military preparedness, and therefore military planning, more difficult, for it had kept the bulk of the US ground forces in the separate State militias. As much as anything else, this stood in the way of a winning strategy in the war against Britain.

George Washington had cautioned in his farewell address against "permanent" alliances (he is typically misremembered as having warned against "entangling alliances," a phrase which actually originated with Thomas Jefferson on another occasion). What Washington was perhaps counseling here, and what many American national leaders saw as the natural course to follow, was little more than a variation on the "balance of power" policy that Britain had so long also followed in Europe, a policy which the British sometimes also described as "splendid isolation."[8]

The British would wait to see who was likely to win a war, before intervening on the side of the likely loser—to keep him from being a loser. They negotiated alliances, but never let them become "permanent" or "entangling." One got into alliances when one needed help, and one tried to get out of such alliances when this need had passed.

One can find phrases from Washington that sounded like a faithful echo of this British balance of power theory. Washington predicts that "the period is not far off when we may defy material injury from external annoyance," i.e., the time when the United States will be so secure that it does not have to watch for alliance opportunities.

Traditions of Isolation

The years after the War of 1812, perhaps all the way to 1890, are a third phase, when Americans can then indulge themselves in all of what we remember as liberalism and isolation. US national security was now much more assured than before 1815, and national expansion took the country to the Pacific. The Monroe Doctrine was proclaimed, implemented in effect by British naval power, since US liberal theories of free trade also now commanded a following in London.

The Mexican War looked like an easy war in retrospect, as the United States won all the victories, and gained a great deal of territory. The relatively uninhabited status of most of the territory taken (except in California and Texas, where English-speaking immigrants from the United States had come to outnumber Spanish-speakers loyal to Mexico), eliminated most qualms about whether the commitment to government by the consent of the governed was being retained.

It is in these years that our constitutional practices become truly a tradition, rather than the inauguration of practices from a freshly printed document. It is from these seven or eight decades that we draw much of our feeling of an "American way" of sorting out issues of peace and war, an American sense that we never initiate wars or plan aggressive wars, that we avoid all alliances and not merely "entangling" alliances, that we mainly achieve good in the world by the shining example of the success of our own democracy.

In 1850, the US Supreme Court actually rendered a decision (which has not become the precedent for other court rulings since then) that the United States by its Constitution, was enjoined from planning for aggressive and acquisitive warfare:

> The genius and character of our institutions are peaceful and the power to declare war was not conferred upon Congress for the purpose of aggression or aggrandizement.[9]

The US Civil War might be seen to lie outside our purview, since it was internal, and required no formal declaration of war. This shock it inflicted on the normalcy of our constitutional processes was, of course, greater than in any of the foreign wars, but much of the shock came on different dimensions of the constitutional fabric.

Yet the Civil War still poses one or two operational questions. Was there much advance "strategic planning" for the Civil War? *If* there had been more of such planning, and if there had been a large standing US Army, could such an insurrection and war even have broken out? How does one compare the Civil War with other US wars in terms of how long it ran, and how expeditiously it was fought, once any plans had been drawn up?

One can venture the generalization that World War II is the model of a war that went largely by the timetable set by advance US planning, while the Civil War was one long string of delays and disappointments, in terms of the US Government's plans for winning a victory. The unplanned Civil War was intended at first to be wrapped up in weeks and months, and in the end took more than four years. The planned World War II was expected to take five or six years, and in the end took less than four years for the victory to be achieved.

The End of Isolation

If the period of American "splendid isolation" is to explain much of what we think we remember of the spirit and meaning of the US Constitution for the planning of foreign policy and military policy, this was not to last. The world changed, and especially its relevant military technologies changed, as the nineteenth century drew to a close, with technological breakthroughs on the seas and then in the air.

It is a commonplace observation to note that the United States developed new international attitudes and more open policies after 1890. The Spanish-American

War in 1898 and the entry into World War I in 1917 amount to important landmarks here.

Yet the United States hardly entered the world power arena with total enthusiasm, or with everyone agreeing that the anti-military tradition imputed to the Constitution should now be forgotten. The rejection of the membership in the League of Nations in 1919, a League that the American President Woodrow Wilson had largely designed and the "back to normalcy" campaign which elected Warren Harding President in 1920 are often seen as an attempt to return to isolationism, and to a set of values that would not assign any priority to war-planning.

But the difficulties of isolation, and of declining to contemplate and plan for the possibilities of war, were apparent already when Hitler came to power in Germany. They were brought into dramatic focus when the Japanese launched a surprise attack on Pearl Harbor on December 7, 1941.

The Pearl Harbor attack has continuously thereafter set Americans into conflict with much of their earlier constitutional tradition. How much more damaging would the Japanese attack have been if it had truly caught the United States by surprise in every respect, rather than merely on the tactical question of what bases the Japanese would strike at first? How fortunate that the United States had engaged in some ABCD (American-British-Chinese-Dutch) war planning before the Japanese attacked, despite whatever violation of the constitutional tradition this might have seemed to entail.

Many Americans were still hoping, once World War II was ended, that the United States could return to a style which assigned greater priority to domestic checks and balances and normalcy, and less to preparedness for foreign encounters; the rapidity of the demobilization of US military forces after the German and Japanese surrenders in 1945 shows the strength of such sentiments.[10] Yet the violations of Stalin's commitments in Eastern Europe, and the speed with which the USSR acquired

nuclear weapons, and the surprise attack on South Korea in 1950 stunned Americans almost as much as Pearl Harbor; such surprises supported a feeling that military preparedness, including planning for the possiblity and execution of warfare, now would always be needed, whatever our memories of our constitutional tradition.

The Letter of the Constitution

There are not many specific provisions of the US Constitution that seem relevant to the legitimacy of planning for future wars. The most important are: The Congress is empowered in article I, section 8, to "provide for the common defense," "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," "to raise and support armies" (with appropriations to be limited to two years), "to provide and maintain the navy" (no time limit), and to provide for calling forth the militia, and for organizing, arming and disciplining the militia.

The Senate additionally has a voice by article II, section 2, in consenting to the appointment of all officers of the Federal Government, including its military officers; and, in the same section, the President is identified as "Commander in Chief."

Given the memories of the Constitution's framers on what the American Revolution had been all about, they committed the United States to varying kinds of divisions and decentralizations of powers. Certain decisions were to be made by the Congress, specifically on whether or not to declare war and the voting of appropriations for the maintenance of armed forces. The bulk of the military potential of the United States was to remain, moreover, in the State militias—which would leave the State legislatures as another check on any abuse of authority by the Federal Chief Executive.

As the power to declare war was left in the hands of the Congress, this presumably was something that the

Congress was to do all by itself (like the submission of constitutional amendments), with the President not having to sign or approve such a declaration, and hence not being able to veto it. As a more shared power, the Congress would have to vote appropriations to sustain the armed forces, and the President would have to approve such appropriations, or, if he vetoed them, the Congress would have to override his veto by a two-thirds vote.

Yet, among the dissatisfactions with the Articles of Confederation, which had triggered the writing of an alternative US Constitution, international considerations, including the inherent risks of war, had played an important role. While the drafters of the Constitution still included those who feared what a preparation for these risks might do to domestic liberties, there was also a substantial awareness of what foreign military forces could do to our independence.

The Constitution then was clearly a major (though heatedly argued) step toward centralization and upgrading of national power, as compared with the Articles of Confederation, where all the military had been left in the hands of the separate State legislatures, with the Congress simply able to call for the voluntary submissions of such State militias to national service.[11]

The President, in article II, section 2, of the Constitution, was moreover identified as being also the "Commander in Chief," this being the *only* place in the entire document where he is assigned a post, rather than explicit duties. The obvious implication was that such a "Commander in Chief" post might have responsibilities that were already understood around the world as an inherent part of sovereignty. All nations have to have armed forces; all armed forces have to have commanders, and there must always be a commander of commanders, the commander in chief. It was not a post that the framers of the Constitution thought could be dispensed with.

The Military Product

As the United States moved through the first century of its Constitution, and then into its second, the following pattern applies to the character of the armed forces pledged to uphold it. The Federal armed forces of the United States were very small. Only a fraction of military-age manpower ever wore uniform, much less than the norm in Europe or Asia. The significant exceptions arose during short bursts of warfare with foreign powers, the War of 1812 and the Mexican War, and then the Spanish-American War (there is also a most important and precedent-setting exception during the Civil War).

The soldiers in Federal service were recruited, until the Civil War, entirely on a volunteer basis, while the State militias had a pattern of mixing voluntary recruitment with a compulsory draft. State militias loaned to the Federal Government generally provided sufficient totals of military manpower during the War of 1812 and the Mexican War, and again during the Spanish-American War, but numerous problems arose in the first two of these armed conflicts. Whether such militias could serve outside the United States itself (and even outside their home states), and whether they would continue to serve after their specified term of enlistment expired proved to be a problem.

The practical impact of these structural guards against Federal tyranny and Presidential tyranny is that it was difficult for the US military leaders to do much "strategic planning," even if there had been nothing about the tone of our liberal society which disapproved of such planning. If one does not know what troops will be available, or how they are equipped, or for how long they will be obligated to serve, what is the point of conducting extensive staff planning ventures?

The fractionated and decentralized nature of the civilian side of US defense structures was matched for all of the nineteenth century on the professional military side, where the Army and Navy were separate cabinet-level departments of the US Government, in effect no

more tightly related than either would be to the State Department or to the Department of the Interior, and where separate supply divisions of the Army reported directly to the Secretary of the Army, and separate bureaus of the Navy reported directly to the Secretary of the Navy, without the integrating function of any uniformed general officer serving as a chief of staff.

Structure reinforced philosophy in the American aversion to war planning, right up to the Spanish-American War, with the US entry into that war seeing a great deal of advance public fervor and indignation at the Spanish suppression of popular rule in Cuba, but no real effective planning for how to fight that war. The total of some 28,000 men in the uniform of the US Army at the declaration of war, some of them experienced only in Indian fighting in the west, was hardly sufficient to attack and defeat the force of more than 100,000 Spanish soldiers on the island; once again the US Government had to turn to a mixture of State militias and volunteer enlistments to assemble a force for an invasion of Cuba, with the timing and the location of the invasion hardly the subject of much advance planning.[12]

The aftermath of the Spanish-American War saw a definite upgrading of the American commitment to participation in the politics of the world, including its military interactions if need be.[13]

At the beginning of the twentieth century, the United States had digested its own experience in the 1898 War, and what it knew of the European commitments to staff work and war planning, to commit itself to a pair of such planning organizations, the General Staff for the Army, and the General Board of the Navy, with the two Services actually doing some joint planning through the vehicle of the Joint Army and Navy Board, composed of four senior officers from each Service. After 1902, the US Army had its own Army War College, and the two War Colleges were also counted upon to engage in planning exercises.

Similarly, one saw periodic congressional discussions on whether the United States should not have a general staff more on the pattern of the general staffs of the armies of Europe, with the German general staff being the model most often addressed.[14] But the resistance of the bulk of the Congress to such an institution, reinforced by the opposition of the traditional bureaus to any such intrusion into their spheres of their autonomy, and the resistance of the National Guard to any surrender of State militia rights show how strongly Americans still feared the possible price of the threat to domestic liberties posed by *planning* for foreign wars.

By the time of World War I, the United States had developed "war plans," color-coded by the contingency of who the enemy would be, with Plan Black being for a war with Germany, Plan Red for a war with Britain, Plan Orange for a war with Japan, and so forth. Yet the spirit of American politics and constitutional practice is still shown by the fact that all such plans presupposed some foreign invasion of the North American continent.[15] The Black War Plan for a war against Germany was thus basically useless for actual American military operations when the United States decided to enter World War I.

The American public is, even today, not well disposed toward "war-planning." Except for those students specializing in international relations, who accept the general analysis offered by a "realpolitik" emphasis on power politics, there is a general shock whenever some enterprising historian or newspaper reporter uncovers outdated "war plans," drawn up for some past contingency where the United States might have been drawn into war with Britain or France, or might have had to invade Canada, or more recently might have had to use nuclear weapons against the Soviet Union.

The Constitution is far vaguer on the issues of war planning and war waging than on many domestic policy choices. Given the elasticity with which the Constitution has been interpreted on issues such as interstate commerce, there would, in the literal wording of the

Constitution, hardly have been any insuperable barriers to the establishment of a General Staff in the German or European sense, or to extensive advance planning for military contingencies and wars, or for a very heavy trusting of the President in his role of Commander in Chief.

Rather, it has been argued, it has become the spirit and traditions of the US Constitution that have been a much more effective barrier to the kinds of continual and active planning and preparation for war that characterized the more "realistic" and tough-minded regimes of the European "old-world."

Distrust of central government goes hand-in-hand here with a distrust of the commitments implicit in any foreign alliances, and a distrust of the militarism which might follow planning and preparations for foreign wars. Distrust of *centralization* involves giving the Congress a larger role and the President a smaller, and it entails keeping a large fraction of military preparation under the aegis of the separate State governments, rather than the Federal.

"Hyphenated Americans" and Neutrality

While the United States was building a larger navy and army at the beginning of the twentieth century, adherents of a constitutional interpretation, frowning on the military expansion plans, could draw reinforcement from American citizens who had hardly been around in the prior decades of this tradition, but who had their own reasons to oppose war-planning. "Hyphenated Americans" would naturally tend to judge the merits of any plans to enter World War I (or even World War II) by whether they were of German or Irish origin, or instead of British or Polish. Such groups would be resolutely against any deviation from the constitutional tradition of neutrality.

The general issue of neutrality, in any war that was already underway among foreign powers, would intersect with the US Constitution in at least three ways. First,

those who took constitutional law seriously would also take international law seriously. One indirect product of the success of the US Constitution, and of the entire political system which it has created, is that Americans have a great confidence in contracts and in laws, with many Americans feeling that international law could be utilized to solve international conflicts, just as legal contracts had handled such conflicts among the American States, and among individual American citizens. If international law suggested that a neutral nation be fully and strictly neutral, perhaps this meant that it should bar plans for joining one of the sides.

The same strict neutrality would be favored, of course, by those who had distrusted all participation in wars, or even preparations for participation in wars, as potentially corrosive of democratic and free government at home. Staff planning, in this view, was a part of militarism, and militarism was a major threat to free elections and free press, and all of the domestic freedom that had made the United States such a good country.

Third, a strict neutrality would now also be favored by any ethnic minority that distrusted the inclinations of the majority. German-Americans and Irish-Americans thus opposed what they suspected to be the planning inclinations of the US Army or Navy in 1916, while Italian-Americans, and Americans of English ancestry, were inclined to favor it. The same Italian-Americans would have opposed such war planning in 1940 and 1941.

How would German-Americans have reacted to the contingency planning by US staff officers for a war with Britain, including invasions of Canada, and so forth? If they had been naive enough to treat all strategic-planning efforts as equally serious, they would have been enthused by these efforts, and might have seen them as balancing out planning for the anti-German contingency. If they were more politically conscious and astute, as Woodrow Wilson himself was, they would have realized that not all contingency plans are written with the same seriousness and enthusiasm. If the public in the United States in 1916

was debating only between neutrality, and entry into the war on the side of the Entente, the best posture for a German-American or Irish-American was then to be totally against all preparations for war because of a conflict with the US Constitution's literal injunctions, or with the constitutional tradition as it had come to be understood.

Woodrow Wilson is often painted as a very naive American liberal, for his attitudes about a possible peace arrangement at Versailles, and earlier for his opposition to US staff planning for the possibility of entering World War I. Yet one should not underestimate Wilson's awareness of political realities, in both international and domestic political processes. The President in 1915 and 1916 was concerned to preserve the chances of keeping the United States from having to enter World War I. Clamors had arisen on all sides within the United States for "preparedness," meaning some military training to get the US Army's potential up to a meaningful level (the Army at the time of Sarajevo amounted to some 70,000 men), and for a construction of a major US Navy. Any serious analyst of political processes will recognize that the enhancement of a tool can affect the likelihood of that tool's use. However much the advocates of military preparations, and of military war planning, favored such steps entirely on a *contingency* basis, the chance existed that such steps would make the contingency occur.

The liberal fear, expressed here most straightforwardly and bluntly, would be that generals and admirals would *want* to get into a war, once they had their forces prepared. A much more subtle version, however, would see such military leaders as not all so consciously eager to get into actual combat, but as being perhaps more subtly inclined that way, by the need—in a democracy—to justify whatever resources have been committed to preparations for a contingency. The entire nation, not just its military leaders, might have concluded that it ought to declare war when the Germans (or someone else) had next done something obnoxious and insulting because,

after all, the troops had been trained, and the ships had been built, and the war plans had been drafted.

We, thus, have a reversal of a cycle here. In a number of the cases we identified earlier, the War of 1812 with Britain, and the wars with Mexico and Spain, the United States had not engaged in serious war planning because it did not have the troops in shape to plan for, and had not developed any capacity for staff planning. In the 1914-1917 instance, Wilson was against war planning by the staffs that now had been brought into being, for fear that it might prematurely bring the troops into existence, or at least might hinder his ability to postpone involvement.

Special Treatment for the Navy

The US Navy has always been a little less subject to suspicion in the American constitutional framework, probably because it is more difficult to impose any tyrannical dictatorship at home by the application of naval force. The ships and crews of a naval force also have to be prepared more for war at the outset, and there is less of a role for State militia participation in any such naval effort. The Constitution limits appropriations for the Army to no more than two years into the future, but does not similarly limit appropriations for the Navy.

The best-known US strategic writer, as we entered the twentieth century, was Alfred Thayer Mahan, a member of the faculty at the fledgling Naval War College, a theorist of strategy and strategic planning on a global scale.[16] Naval warfare generally lends itself to abstract speculation, as the oceans strike one and all as a clean chessboard, unencumbered by local peculiarities and complications.

Americans remember their wide oceans nostalgically as a buffer against attack, as a reinforcement for isolation, obviating the need for military preparedness and advance planning. But on the naval side, such oceans are not an exemption from planning, but the field for planning, the remote arena on which forces would have to be

deployed to counter and undo the impact of hostile forces.

It was this limited nature of the US naval strategic problem that Mahan was basically writing about. With the United States and other industrializing nations each being separately able to challenge the British naval monopoly, Mahan saw the assumption of a greater role on the seas as the great analytical challenge for US naval officers and civilian leaders.

The Special Demands of Foreign Policy Since World War II

The problems of American foreign policy, and of preparation for the possibility of war, have changed since World War II. Many would point to the introduction of nuclear warheads, and of bombers and missiles to deliver them. If it only takes 30 minutes for an ICBM to travel from the USSR to a target in the United States, and vice versa, how could anyone speak of a ban on contingent advance strategic planning, or refer to the need for a prior Declaration of War by Congress?

The world was resolved in 1945 to banish war from the world, and in the Charter of the United Nations, it took various organizational and legal steps to this end. Cynics would respond that a change in legal nomenclature does not normally generate any change in the material reality; analysts must thus argue back and forth on whether the United Nations has indeed had any more success than the League of Nations, and on whether the frequency of war is at all down after 1945 as compared with any comparable four-decade period (and if this incidence of war is at all down, is this due to the United Nations, or to nuclear weapons?). If international law was now to be loaded down with euphemisms, by which wars were no longer "declared," this difference of purely legal distinction could complicate what is essentially a legal process within the United States, the faithful execution of the contract of the Constitution.

We have been discussing what Americans regard as permissible for their own military staff officers, and their

Government, in general, to be doing, prior to a declaration of war. Yet, the years since 1945 have seen very few such declarations, as the United Nations Charter has made it much more difficult for any of the powers ever to admit that they are engaged in a formal war. This may look like the worst kind of hypocrisy, or as a simple kind of appeasement of the gallery of neutral powers, as either side to a war would lose propaganda points if it were openly to "declare" war, but it certainly generates confusion for the American constitutional practice, wherever we have been keyed on whether Congress has declared war or not.

Second, apart from the hypocrisy produced by articles 2 and 33 of the United Nations Charter, forbidding recourse to war, and by the general cost in world public opinion of being the first to declare war, there is another powerful explanation for why we have seen so few declarations around the world in the years since 1945, and none by the United States.

Guerrilla war has become a more important part of international conflicts, with many of the conflicts being simply about which regime is to be recognized by the government of any particular state. If the United States recognizes the government of the Philippines or of the Republic of Vietnam, and such allies ask for US assistance in the suppressing of bandits or guerrillas trying to overthrow these Governments, who is there for the United States to declare war against?

Perhaps because nuclear deterrence has precluded higher level conflicts, perhaps for other reasons, much of warfare since 1945 has now taken the form of such guerrilla insurrections, of challenges to the authority and sovereignty of particular regimes, where the combatants had never "recognized" each other as states, and would never, even in an earlier time, have had occasion to "declare war" on each other. When the United States gets dragged into these wars, new complications arise for the tidiness of our legal and constitutional practice.

Third, the aftermath of World War II, even if nuclear weapons had not appeared and the United

Nations had not been created, saw the United States left as one of the two most powerful countries in the world. What had been the historical constitutional practice of a bystander might not suffice as the practice of the major participant.

When the United States was still not the strongest military power in the Western World, the entire issue of "strategic planning" had a different tone. The United States did not have to be continually involved in the deployment of military force, and the application of deterrent threats of the use of such force; what has been normal since 1945 was decidedly abnormal for most of the years before 1941.

War planning in the years before World War II could thus have drawn criticisms from American liberals because it envisaged a crossing of some threshold, a transition from a situation which most Americans decidedly preferred—peace, to something they hated—war. We do not use the "war plan" phrase today anymore. Our Government prefers "defense planning" (in parallel with the shift from a War Department to a Defense Department in the 1947 reorganization), or "strategic planning" because we are, in some significant sense, continuously in a cold war. What Americans hated in the years before 1939 is now at least partially with us: the need to keep large numbers of our young men in uniform and the continuing risk of shooting exchanges. We struggle now to keep war limited, rather than to stay at peace.

If war was once seen as totally discontinuous from peace, then planning for such a war could be viewed as a violation of the spirit of peace, a violation of neutrality if others are already at war, or a disgraceful betrayal of one's neighbors if they are not. Such war planning also might cause wars to happen that would not otherwise occur. In any event, they would be the worst kind of insult for any other country that eventually found itself mentioned in them; war plans would have to be kept secret to be useful—but secrecy always erodes sooner or later.

But if war is now seen as a possibility on the horizon, something that must always be taken into account, then its contingencies must be planned for. "War is the continuation of politics by other means," that most memorable phrase by Clausewitz, has always had two meanings.[17] It nourishes the liberal contention that political considerations should not be lost sight of during a war, i.e., that "war is too important to be left to the Generals;" but it also nourishes the power-politics contention that war is not such a discontinuous change from peace. All of international relations continually play with the threats and exercises of varying degrees of warfare. One could indeed mint an aphorism here that "peace is simply the extreme case of limited war," and much of what we have had to wrestle with since 1945 has been quite consistent with this.

Some Conclusions

There are many ways to sort out the divisions of powers on strategic planning as they are outlined in the US Constitution. Since the explicit language is not extensive, much depends on what we find to be sensible and logical.

Since only Congress has the ability to "declare war," some would see this as shifting all the important and relevant authority to Capitol Hill. The 1973 War Powers Resolution was indeed an effort to bring such an interpretation to bear on the ordinary practice that had emerged after World War II, by which wars are typically not "declared" in terms of international law. In the wake of the way that the United States had entered the Vietnam war, Congressmen won a great deal of public sympathy in their contention that the Founding Fathers had intended for Congress to be the decisionmaker, even on small ventures into violent international exchanges.

Yet a counter-view would have held that Congress, by the sorting of powers and functions in 1787, had simply been dealt the role of proclaiming discontinuous and major changes in our relations with a foreign power. If

we are at peace with Spain, and then go to war with Spain, Congress makes the decision on when this change is to take place. But what if we were to be continuously in a state of limited war with some foreign adversary? Would it have been the intentions of the 1787 drafters of the Constitution to have congressional approval required for a declaration of each small upsurge in the violence of this kind of an exchange? Should Congress be required to "declare battles," as well as to declare wars?

The United States fought an "undeclared war" (a naval war with the French) before Congress got to exercise its function of declaring war. It also fought without such a declaration against the Barbary pirates (it is little remembered that after several decades of such warfare, the Congress was finally asked for, and gave, a formal declaration of war against one of the North African states, Algiers, in 1815, a declaration of war which almost none of our history books remembers).[18]

This is to come back to the argument that a "realistic" assessment of how the war-planning and war-management function is to be handled was indeed present at the outset, just as it has to be present now; it could only be dispensed with when we enjoyed some 70 years of relative exemption from foreign military engagements.

Notes

1. For a discussion of the environment and significance of Washington's farewell address, see Dexter Perkins, *A History of the Monroe Doctrine* (Boston: Little, Brown, 1941), chap. 1.

2. The strategic situation of the United States in its first decades of independence is discussed in Walter Millis, *Arms and Men* (New Brunswick: Rutgers University Press, 1984).

3. John Dos Passos, *Mr. Wilson's War* (Garden City, N.Y.: Doubleday and Company, 1962), p. 201.

4. On the world outlook of the Americans when they were still governed by Britain, see Millis, *op. cit.*, chap. 1.

5. Some of the British diplomacy with regard to holding on to posts in the American Northwest is outlined in Kenneth Bourne, *Britain and the Balance of Power in North America* (Berkeley: University of California Press, 1967).

6. On the US policy toward Britain and France after the French Revolution, see Perkins, *op. cit.*

7. Russell F. Weigley, *The American Way of War* (Bloomington: Indiana University Press, 1973), chap. 3.

8. On the description of the "balance of power" see Ernst B. Haas, "The Balance of Power: Prescription, Concept, or Propaganda?" *World Politics*, vol. 5, No. 4 (July 1953), pp. 442-77.

9. *Fleming vs. Pace*, 50 U.S. 603 (1850).

10. On the rapidity of the American demobilizations in 1945 see Samuel P. Huntington, *The Common Defense* (New York: Columbia University Press, 1961), pp. 35-36.

11. On the broader power struggle between the President and Congress, see Cecil V. Crabb, Jr. and Pat M. Holt, *Invitation to Struggle* (Washington: Congressional Quarterly Press, 1980).

12. The planning, or lack of planning, for the Spanish-American War is outlined in Jack Cameron Dierks, *A Leap to Arms* (New York: J.P. Lippincott, 1970).

13. On this period, see Foster Rhea Dulles, *America's Rise to World Power* (New York: Harpers, 1954).

14. On American attitudes toward anything like the German General Staff, see John M. Collins, *U.S. Defense Planning: A Critique* (Boulder, Colo.: Westview Press, 1982).

15. Dos Passos, *op. cit.*

16. See especially Alfred Thayer Mahan, *The Influence of Sea Power Upon History* (New York: Hill and Wang Reprint, 1957).

17. Carl von Clausewitz, *On War* (Princeton: Princeton University Press Translation, 1976), p. 87.

18. See Glenn Tucker, *Dawn Like Thunder: The Barbary Wars and the Birth of the U.S. Navy* (New York: Bobbs Merrill, 1963) pp. 452-53.

LEGAL LESSONS IN NATIONAL SECURITY

By EDWIN TIMBERS

Consultation does not automatically gestate consensus, but it is surely a precondition. On the other hand, foreign policy by executive preemption almost always has a painful recoil.
—John C. Culver

THE IRAN-CONTRA AFFAIR OF 1986-87 HAS BEEN ONE OF the most important constitutional confrontations between Congress and the White House in US history, another skirmish in the long line of conflicts between the President and Congress over their respective powers in the field of foreign affairs, including the power to use and threaten to use US armed forces. This conflict began in President George Washington's second term of office, and has continued unabated and unresolved ever since. Although the pattern of practice and the guidelines of the Supreme Court are clear, Congress from time to time has refused to follow the Court's decisions with the result that there has been a recurring political controversy.

Congress claims that the President is constitutionally obliged to "consult" Congress, or at least to inform it, of everything he does or plans to do in the field of foreign affairs, and that it has the right to pass laws restricting and controlling Presidential actions in this field. President Reagan and his predecessors claim that the Constitution

The late Dr. Timbers was a faculty member of the Industrial College of the Armed Forces. The Center for the Study of the Presidency will publish this essay in 1989-90 under the title, "Legal and Institutional Aspects of the Iran-Contra Affair."

entrusts the President with the sole power to conduct the foreign relations of the nation and a substantial share of the power to make foreign policy. In the field of foreign affairs, all Presidents have insisted that they are responsible not to Congress but only to the people, particularly the conduct of secret diplomacy. President Nixon's secret warning to the Soviet Union to not bomb China's nuclear plants is an example of such uniquely Presidential action.

President Reagan's strong support for the Nicaraguan Democratic Resistance Forces, commonly known as the "contras" or "Freedom Fighters," resulted in an intense political struggle between him and Congress over the definition of US policy toward Nicaragua. He was determined to prevent the spread of communism from Nicaragua to El Salvador, Honduras, Guatemala and, ultimately, Mexico, and he sought to accomplish this by providing not only military and economic aid to the democratically elected government of El Salvador but also aid to the contras to force either a change in the expansionist policy of the Sandinista regime or the overthrow of that government.

Congress, on the other hand, was responding to public-opinion polls, which indicated that a majority believed that the United States had no vital interest in the outcome of the struggle between the Sandinistas and the contras, that the growing involvement of the United States in this Central American war would ultimately lead to a Vietnam-type war that would result in American casualties, possibly bring the United States into a military confrontation with the Soviet Union, and fail to bring democracy and freedom to the Nicaraguan people.

On December 21, 1982, Congress sought to restrict the President's ability to implement his policy when it passed the first of five Boland amendments, prohibiting the Department of Defense (DOD) and the Central Intelligence Agency (CIA) from spending funds to overthrow the government of Nicaragua or to provoke conflict between Nicaragua and Honduras.[1] This amendment passed in the House of Representatives by a vote of

411-0, was later passed by the Senate, and was signed into law by the President.

On December 9, 1983, Congress passed the Intelligence Authorization Act for Fiscal Year 1984, which changed the first Boland amendment by limiting the obligational authority of the CIA and the DOD to $24 million for aid to the contras. In section 101, this statute specified that it referred to the Central Intelligence Agency; the Department of Defense; Defense Intelligence Agency; the National Security Agency; the Departments of Army, Navy and Air Force; the Department of State; the Department of Treasury; the Department of Energy; the Federal Bureau of Investigation; and the Drug Enforcement Administration.[2] Also, whereas the first Boland amendment prohibited only activities done for the purpose of overthrowing the government of Nicaragua, the second prohibited any expenditures above $24 million "which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual."[3]

On October 3, 1984, Congress cut off all funding for the contras and prohibited the Department of Defense, the Central Intelligence Agency, and any other agency or entity of the US Government "involved in intelligence activities from directly or indirectly supporting military operations in Nicaragua."[4] This outright prohibition was subject to conflicting interpretations. Whereas several of its congressional supporters believed that the activities of the National Security Council were covered, the President's Intelligence Oversight Board advised that the restrictions on lethal assistance to the contras did not cover the National Security Council staff.[5]

The fourth Boland amendment, which covered 1985-86, included $27 million for "humanitarian" aid to the contras. Considerable debate occurred about the scope of the term "humanitarian," particularly over a gray area of items that are both nonlethal and nonhumanitarian, such as military-type uniforms. It was

finally decided that "humanitarian" aid included food, clothing (including uniforms), and medicine.[6] The arming, training and advising of the contras by CIA and DOD personnel were prohibited.

The fifth and final version of the Boland amendment provided a classified amount of aid for the contras from December 1985 to October 1986.[7] In June 1986, Congress voted $100 million in aid for the contras.

A strict construction of the Boland amendment would exclude the National Security Council staff, since it is not 1 of the 10 agencies of the Government designated. Even this construction, however, would not necessarily exclude either Lieutenant Colonel Oliver L. North, a key member of the National Security Council staff, or Vice Admiral John M. Poindexter, USN, Assistant to the President for National Security Affairs, since they were and are uniformed members of the Department of Defense, one of the agencies expressly designated in the Boland amendment.

The principal members of the National Security Council are the President, the Vice President, the Secretary of State, and the Secretary of Defense, and its meetings are usually attended by the Director of Central Intelligence and the Chairman of the Joint Chiefs of Staff. Since the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency are three of the nation's principal generators of intelligence data and analyses and since all of the above officials are major users of such data and analyses, the Boland amendment could reasonably be construed to apply to the National Security Council and its staff as an agency "involved in intelligence actvities."

United Nations and Rio Agreements

Equally relevant to the extension of US aid to the contras are the provisions of the United Nations Charter, the Charter of the Organization of American States, and the Inter-American Treaty of Reciprocal Assistance of 1947 (the Rio Treaty). As a signatory of each of these

treaties made under the authority of the United States, the United States is bound by their terms.[8] Article 2(3) and (4) of the United Nations Charter states

> 3. All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered.
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United States.

The mining of Nicaraguan harbors by the CIA was an act of war against Nicaragua and plainly in violation of article 2(4). Moreover, all lethal aid given by the United States to the contras was tantamount to an armed attack on Nicaragua according to well-established principles of international law.

Article 33(1) of the charter states

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

At no time did the United States seek to resolve its differences with Nicaragua by any of these means. It withdrew from the compulsory jurisdiction of the International Court of Justice in the case of *Nicaragua v. United States*[9] and withdrew its support of an agreement worked out in September 1983 by the Contadora Group of nations—Mexico, Venezuela, Panama, and Colombia—which provided a peace plan for Central America.

Article 51 of the charter, however, protects "... the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Under this article, the position of the United States has been that the shipment of arms by Nicaragua

to the Salvadoran guerrillas was, in effect, an "armed attack" against the government of El Salvador and that United States assistance to the government of El Salvador and to the Nicaraguan contras was an act of collective self-defense against an attempt to overthrow the government of El Salvador and against the threat created by Communist expansion in Central America to the security of the United States. After the Cuban Missile Crisis of 1962 and the Six-Day War of 1967, the world community decided that a state does not have to wait before exercising its right of self-defense until it is too late but can act anticipatorily to protect itself against threats and its perceptions of attack before an actual attack has occurred.[10] On the other hand, according to Professor Eugene V. Rostow, "states are absolutely prohibited by international law from assisting rebels against the government of a state, even if hostilities reach the level of actual belligerency...."[11] Thus, international law would condemn equally United States aid to the contras and Nicaraguan aid to the El Salvadoran guerrillas.

In 1970, the United Nations General Assembly adopted by consensus the "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations." That declaration stated

> No State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

The activities of the United States in support of the contras plainly violate this declaration.

Article 18 of the Charter of the Organization of American States (OAS) imposes similar obligations:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.[12]

The activities of the United States in providing both lethal and nonlethal aid to the contras violate this article.

Articles 23 and 24 further require that all disputes arising between the States in this hemisphere are to be submitted to peaceful procedures including direct negotiation, good offices, mediation, investigation, conciliation, judicial settlement, arbitration, and other means. Moreover, an act of aggression against a State of the OAS is to be considered an act against all members and may consist of any act of aggression short of armed attack. The mining of Nicaraguan harbors by the CIA is a form of "armed attack," and US aid for the contras is an "act of aggression" prohibited by the OAS Charter.

If a State is confronted with such aggression, the Rio Treaty requires that the parties

> submit every controversy which may arise between them to methods of peaceful settlement and ... endeavor to settle any such controversy among themselves by means of the procedures in force in the Inter-American System before referring it to the General Assembly of the Security Council of the United Nations.[13]

In addition to the requirements of the above treaties, section 109(d) of the 1984 Intelligence Act requires the President to

> use all diplomatic means at his disposal to encourage the Organization of American States to seek resolution of the conflicts in Central America based on the provisions of the Final Act of the San Jose Conference of October 1982, especially principles (d), (e), and (g) relating to nonintervention in the internal affairs of other countries, denying support for terrorist and subversive elements in other states, and international supervision of fully verifiable arrangements.[14]

President Reagan has not used any "diplomatic means at his disposal" to comply with the requirements of this act of Congress.

Section 109(e) further states

> The United States should support measures of the Organization of American States, as well as efforts of the Contadora Group which seek to end support for terrorist,

> subversive, or other activities aimed at the violent overthrow of the governments of countries in Central America.[15]

The Reagan administration refused to support an agreement reached by the Contadora Group of nations in September 1983. The above laws and treaties define the duties of the President and his subordinates in the executive branch concerning US involvement in Nicaragua.

Iranian Ventures

The sale of arms to Iran involved another group of laws and had distinctly different objectives from those in Nicaragua. First, the arms sale was intended to obtain the release of American hostages held in Beirut, Lebanon. The seizure of American hostages is a gross violation of international law that entitles the United States to use whatever force is reasonably necessary to cure this breach of international law. If the President decides that the use of force under the circumstances would be imprudent, impractical, or too costly, he can and should negotiate for their release, provided that his doing so will not violate any statutes of the United States. Protecting American citizens abroad who are in such difficulty is an obligation of the United States as a sovereign nation, and only the President can act for the nation in such a situation. In addition, the President hoped that this sale would establish a strategic opening with Iranian moderates which would help improve United States-Iran relations and prevent the Soviet Union from gaining control of Iran, a country of enormous strategic importance to the United States and its allies. Also, the profits from the sale were expected to be used to sustain the contras during the cutoff of aid under the Boland amendment.

During the 1970s, Congress passed several laws that limit the President's options in foreign relations, particularly his authority in arms sales. While several of these laws contain a legislative veto provision, which the Supreme Court declared unconstitutional in 1983 in the

case of *INS v. Chadha*,[16] under the legal principle of severability, the balance of these laws may be deemed valid and binding on the President until they are either repealed by Congress or declared unconstitutional *in toto* by the Supreme Court. The 1973 Foreign Assistance Act (Public Law 99-559) required the President to give advance notice to Congress of any offer to sell to foreign countries defense articles and services valued at $25 million or more, and empowered Congress to disapprove such sales within 20 calendar days by concurrent resolution.[17] The Arms Export Control Act,[18] the principal US statute governing arms sales abroad, makes it unlawful to export arms without a license. Exports of arms by US Government agencies, however, do not require a license if they are otherwise authorized by law. Criminal penalties are provided for willful violations. The Arms Export Control Act also requires that the President consent to any *transfers* by another country of arms exported from the United States under the act and imposes three conditions before such Presidential consent may be given:

> (a) the United States would itself transfer the arms in question to the recipient country;
>
> (b) a commitment in writing has been obtained from the recipient country against unauthorized retransfer of significant arms, such as missiles; and
>
> (c) a prior written certification regarding the retransfer is submitted to the Congress if the defense equipment, such as missiles, has an acquisition cost of $14 million or more.

In addition, the act generally imposes restrictions on which countries are eligible to receive US arms and on the purposes for which arms may be sold. Section 614(2) of the act permits the President to waive the requirements of the act, but this waiver authority may not be exercised unless it is determined that the international arms sales are "vital to the national security interests of the United States." Furthermore, before granting a waiver, the President must consult with and provide written justification to the foreign affairs and appropriations committees of the Congress.[19]

In 1976, the Nelson-Bingham amendment to the Arms Export Control Act tightened these restrictions to include advance notification of any sale of "major" defense equipment totaling over $7 million. Congress is given 30 days in which to exercise its legislative veto.[20]

The report of the Tower Commission states that whether US involvement during 1985 in the Iranian arms sale was lawful depends upon whether the President approved the transactions before they occurred. Without such prior approval, there was no authority for the United States either to transfer arms or consent to Israel's transfer of US-supplied arms to Iran.[21] Although the President did find that the arms sale to Iran was vital to the national security interest, Congress was not notified as required by the Arms Export Control Act, the Hughes-Ryan amendment, and the National Security Act of 1947.[22]

On January 17, 1986, a Presidential finding did formally approve the Iran initiative as a covert intelligence operation under the National Security Act and, thus, provided legal authority for the United States to transfer arms directly to Iran. Despite the fact that the National Security Act requires that Congress be notified of covert intelligence operations, the Presidential finding of 17 January directed that congressional notification be withheld, and this finding was subsequently destroyed by Vice Admiral Poindexter without its having been communicated to Congress. Moreover, when a new provision was added to the Arms Export Control Act in August 1986, prohibiting exports to countries on the terrorism list (a list that contained Iran), no determination was made of the effect of this provision on the legitimacy of arms transfers to Iran under the National Security Act.

Constitutional Considerations

The constitutional obligation of the President and his subordinates in the executive branch to uphold the Constitution, laws of the United States, and treaties to

which the United States is a party, is clearly stated in article II of the Constitution. The final paragraph of article II, section 1, of the Constitution states

> Before he, the President, enter on the Execution of his Office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United States."

In addition, article II, section 3, of the Constitution requires that the President "shall take Care that the Laws be faithfully executed...."

The constitutionality of the Boland amendment has been questioned on the ground that it is a congressional usurpation of the power of the President to function as the sole organ of US foreign relations and therefore a violation of the separation-of-powers principle, which lies at the heart of the American system of government. To be constitutional, a statute must have been enacted according to the procedure specified in article I, section 7, of the Constitution, and it must not be in conflict with any provision of the Constitution. The Boland amendment was passed by each House of Congress and signed into law by the President in accordance with the procedure prescribed by the Constitution. Is it nevertheless unconstitutional on the ground that it violates the separation-of-powers principle?

Article I, section 8, of the Constitution explicitly vests the power of the purse in Congress. In its various versions, the Boland amendment stated the refusal of Congress to authorize expenditures for certain purposes, but it did not prohibit the executive branch agencies it listed from aiding or seeking to aid the contras. These agencies were free to support the contras in any manner that would not involve the expenditure of funds appropriated to them by Congress or which would not exceed the cap which Congress placed on their expenditures for such purpose.

Aid by agencies not designated by the statute, provided that they were not engaged in intelligence-

related activities, was allowed, it was argued, as was aid by nongovernmental donors with private funds. Among the precedents for the Boland amendment were the Nelson-Bingham amendments,[23] the Cooper-Church amendment of 1971,[24] the Fulbright amendment to the Second Supplemental Appropriations Act for FY 1973,[25] the War Powers Resolution of 1973,[26] the Hughes-Ryan amendment to the Foreign Assistance Act of 1974,[27] the Turkish Arms Embargo of 1974,[28] and the Clark amendment to the Arms Export Control Act of 1976.[29]

In addition to the above statutes, the Constitution makes numerous provisions for the participation of Congress in the formulation and implementation of US foreign policy. The Constitution requires that, before a treaty can take effect, it must first be approved by a two-thirds majority of the Senators present, provided there is a quorum. The Senate, moreover, may change the wording of a treaty draft, which means that it must be resubmitted to other parties for approval. The Senate may also write "reservations" limiting the obligations of the United States, and it may state its "understandings" which interpret provisions. Although the House of Representatives does not approve treaties, it can refuse to pass implementing legislation or to fund treaties.

Even in the absence of treaties or statutory authority, the President has inherent constitutional power, since he is the sole organ of the nation in the conduct of foreign relations, the Commander in Chief of the Armed Forces, and the Chief of State.[30] Subject to the approval of the Senate, he appoints ambassadors, ministers, consuls, and the principal policy-making officers of the Department of State, Department of Defense, and the Central Intelligence Agency. As Commander in Chief, he may also introduce American troops into hostilities abroad. Although Congress cannot prevent him from engaging in foreign covert-action operations, it can establish and oversee the means he uses to execute them. Thus, while Congress cannot forbid him to use secret agents in the execution of his constitutional duties as President, it

could, for example, forbid such agents to engage in political assassination. As Professor Eugene V. Rostow has stated

> the principle of the separation of powers does not mean that the three separate branches of the government are really separate at all. For the most part, their powers are commingled and shared. They are therefore not independent but interdependent, although there are some functions unique to each branch. Only a judge can issue a mandamus. Only Congress can declare war. Only the President can order the troops into battle.[31]

Where the System Malfunctioned

The Tower Commission Report clearly delineated what went wrong in the Iran-contra affair. First, the arms sale to Iran was directly contrary to the administration's policies on terrorism, its arms embargo toward Iran, and its urging of its allies not to sell arms to Iran. This contradiction between policy and conduct undermined United States credibility. Another contradiction existed within the administration when the staff of the National Security Council, the personal staff of the President, was supporting the contras at a time when the Boland amendment forbade other agencies to do so.

Second, the arms transfer to Iran was not subjected either to the established procedures for interagency consideration or to the more restrictive procedures for handling covert operations prescribed in National Security Decision Directive 159. As a result, there was inadequate opportunity for a full hearing before the President. Furthermore, there was no rigorous review of the initiative below the Cabinet level; no formal written minutes of meetings were kept; and, the President's decisions were not formally recorded.

Third, little attention was given to the implications of implementing the initiative. There is no evidence that such questions as the following were adequately addressed: Should the NSC staff, an advisory body to the President, have had operational control of the initiative rather than an agency vested with operational authority

such as the CIA? What were the legal implications of using retired Air Force Major General Richard V. Secord's private network of operatives to implement a major initiative affecting US foreign relations? What were the implications of this initiative for the military balance in the Middle East, especially for the outcome of the Iran-Iraq War? Would these arms contribute to Iran's victory? If so, how would such a victory affect the United States and its allies?

Fourth, the Iran arms sale and the supply of lethal and nonlethal aid to the contras were conducted largely by private organizations with no accountability to the US Government. Is this an illegal act of substituting the funding powers of Congress? Can the President privately fund his foreign policy?

Fifth, Congress was not informed either of the Iran initiative or of the activities of the NSC staff in support of the contras.

Sixth, there is evidence that the Iran-contra initiative violated the United Nations Charter, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance of 1947, the Arms Export Control Act, the Hughes-Ryan amendment to the Foreign Assistance Act, the National Security Act of 1947, and the Intelligence Act of 1984.

Seventh, there is no evidence that the President required a rigorous review of any aspect of the Iran-contra initiative by the NSC principals or the NSC staff, nor did he insist upon accountability.

Eighth, since the President's Chief of Staff from the inception of his tenure asserted strong control over the White House staff, sought to extend his control to the National Security Adviser, was personally active in national security affairs, and attended most of the meetings regarding the Iran initiative, should he have ensured that an orderly and rigorous policy review was conducted and made plans for public disclosure of the initiative? This was not done.

Ninth, neither the National Security Adviser nor the Director of the CIA informed the NSC principals other than the President of the Iran-contra initiative.[32]

Recommendations and Conclusions

The adversarial relationship between the Congress and the President which results from our system of checks and balances and the separation of powers has proved to be of the utmost value in preventing the abuse of power by either branch of government. If this intentional arms-length relationship degenerates into two-branch paranoia, the government can become paralyzed and impotent. It is imperative that measures be taken within the framework of the Constitution to promote that degree of cooperation between the two branches which is essential to the functioning of our government.

To help attain this end and to avoid the recurrence of such an acute confrontation as that of the Iran-contra affair, I submit the following recommendations and conclusions:

First, the President is accountable and responsible for the conduct in office of his subordinates in the executive branch. He should provide guidelines at the beginning of his administration to the members of the National Security Council, his National Security Adviser, and the National Security Council staff. These guidelines should specify how these individuals will relate to each other, what procedures and laws they must follow, and, in general, what the President expects of them.[33] It is particularly important that "each administration formulate precise guidelines for covert action and, once formulated, those procedures must be strictly adhered to."[34]

Second, since the President is accountable and responsible for the entire executive branch, he should institute within the Executive Office of the President a formal reporting, inspection, and review system and require his prior written authorization for the implementation of any major initiative proposed by the personnel of that organization.

Third, recognizing that Congress has a shared constitutional role in formulating and implementing US foreign policy, the President should see to it that the committees of both Houses of Congress concerned with intelligence and foreign affairs are informed of executive branch activities in these areas. This could be achieved by scheduling regular meetings with the chairmen of the intelligence and foreign affairs committees and by reporting all national security decisions of the President to the intelligence committees of both Houses of Congress within a specified period.

Fourth, the National Security Council, as a personal staff agency of the President, should be prohibited by the President from exercising at any time and to any degree the *operational* responsibilities of the Department of Defense, the Department of State, and the Central Intelligence Agency. It should, however, keep these agencies fully and continuously informed of its intelligence activities. In addition, the National Security Adviser should be required to keep adequate records of NSC consultations and Presidential decisions to show what was decided, to provide a basis for a periodic policy review, and to learn from experience.[35]

Fifth, the National Security Adviser should never exclude NSC principals from the decision process nor interpose himself between the President and the NSC principals. He should also keep the principals informed of the thinking and decisions of the President and faithfully represent the views of the principals to the President.[36] He should therefore not use his scheduled intelligence briefing or other briefings of the President to seek the President's decision on significant matters without the participation of the NSC principals.[37]

Sixth, the Attorney General and the Legal Adviser to the Secretary of State should provide advice to the NSC and the President. In addition, the position of legal adviser to the NSC should be strengthened in stature to help ensure that the activities of the NSC conform to the Constitution and laws of the United States and treaties to which the United States is a party.[38]

Seventh, to provide an optimum balance between the imperative of protecting the secrecy of legally authorized covert operations and the need for effective congressional oversight, Congress should consider merging the Intelligence Committees of the two Houses into one Joint Intelligence Committee with a small staff.[39]

Eighth, neither the President nor members of his administration should ever profess a foreign policy for the United States and concurrently recommend such a policy to its allies when such a policy is contrary to the course the administration is actually pursuing.

As a constitutional democracy, the United States is and must be a government of, by, and for the people. When President Nixon used the power of his office to prosecute the war in Vietnam against the wishes of a majority of the American people, Congress passed several laws to force the President to be accountable for his actions and to prevent future abuses of Presidential power.

The United States must be dedicated to the rule of law and the principles of responsibility and accountability if it is to persevere as a constitutional democracy and retain the credibility and respect necessary for its position of leadership in the free world. It must give the highest priority to these principles and make certain that they are scrupulously observed.

Notes

1. Section 793 of the Defense Appropriations Act, FY 1983, Public Law 97-377, 96 Stat. 1865: Ban on Funds to Overthrow Sandinistas. The Boland amendment is the direct descendant of the Hughes-Ryan amendment to the Foreign Assistance Act (Public Law 93-189) of 30 December 1974, which prohibits any CIA activities abroad not directly related to intelligence gathering, "unless and until the President finds that each such operation is important to the national security of the United States and *reports*, in a timely fashion, a description and scope of such operations to the appropriate committees of Congress."

2. Pub. L. 98-215, 97 Stat. 1473.

3. Section 108, Intelligence Authorization Act for FY 1984, Pub. L. 98-215, 97 Stat. 1475.

4. Section 106(c), Continuing Appropriations, Temporary, 1985, Pub. L. 98-441, 98 Stat. 1700.

5. *Report of the President's Special Review Board* (Washington, D.C.: Government Printing Office, February 26, 1987), III-22.

6. Section 722(g), International Security and Development Cooperation Act of 1985, Pub. L. 99-83, 99 Stat. 254.

7. Section 8050, Further Continuing Appropriations, 1985, Pub. L. 99-190, 99 Stat. 1211.

8. Article VI of the Constitution states, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...."

9. 1984 ICJ Report (Judgment of 26 November 1984).

10. Eugene V. Rostow, "Disputes Involving the Inherent Right of Self Defense" (unpublished manuscript, 1987), p. 25.

11. Rostow, "Once More Unto the Breach: The War Powers Resolution Revisited, *Valparaiso University Law Review* XXI (Fall 1986), p. 8.

12. US Treaties 2394 (1951).

13. 62 Stat. 1681; TIAS 1838; 4 Bevans 559; 21 UNTS 77.

14. 97 Stat. 1475-76.

15. Ibid.

16. 462 U.S. 919 (1983).

17. Section 662 of the Foreign Assistance Act, the so-called Hughes-Ryan amendment, prohibits covert operations abroad by the CIA that are not directly related to intelligence gathering "unless and until the President finds that each such operation is important to the national security of the United States and *reports*, in a timely fashion, a description and scope of such operations to the appropriate committees of Congress."

18. 22 U.S.C. 2753(a), (d).

19. 22 U.S.C. 2374(3).

20. Public Law 94-329, 22 U.S.C. 2751. As stated above, the *Chadha* decision made the legislative veto invalid.

21. Tower Commission Report, IV-8.

22. Ibid., VI-9.

23. Ibid., p. 15.

24. This amendment cut off funds for US troops, advisers, and air support in and over Cambodia.

25. This amendment prohibited the use of funds to "support directly or indirectly combat activities in ... or over Cambodia, Laos, North Vietnam and South Vietnam."

26. This act requires the President to notify and consult with Congress before American troops are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances...."

27. See note 17.

28. After Turkey invaded Cyprus in July 1974, Congress imposed an embargo on arms shipments to that country.

29. This amendment prohibited "assistance of any kind . . . for the purpose, or which would have the effect, of promoting or augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola."

30. *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 319 (1936).

31. "On Foreign Covert Action Operation," *Yale Law Report* (Spring 1976), pp. 12-17.

32. Tower Commission Report, IV-11.

33. Tower Commission Report, op. cit., V-2.

34. Ibid., V-6.

35. Ibid., V-2.

36. Ibid., V3.

37. Ibid.

38. Ibid., V-6.

39. Ibid.

APPENDIX

THE CONGRESS, IN ADDITION TO THE POWER TO DECLARE war, "Shall have power" under article I, section 8 (the enumerated powers)

—to lay and collect Taxes, Duties, Imposts and Excises,

—to pay the Debts,

—provide for the common Defense,

—to regulate commerce with foreign nations,

—to define and punish Piracies and Felonies committed on the high seas and Offenses against the Law of Nations,

—to grant Letters of Marque and Reprisal and make Rules concerning Captures on Land and Water,

—to raise and support Armies,

—to provide and maintain a Navy,

—to make Rules for the Government and Regulation of the land and naval forces,

—to provide for calling forth the Military to execute the Laws of the Union, suppress Insurrections and repel Invasions,

—to provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States,

—to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any Department or Office thereof.

Under article I, section 9 (the prohibitory powers)

—No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Article I, section 1 states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

In addition to article II, section 1, "All Executive Power shall be vested in a President of the United States of America," the President has the following powers with respect to national security policy:

—The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia when called into the actual Service of the United States.

—He takes an oath to "... preserve, protect, and defend the Constitution of the United States.

—He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.

—He shall nominate, and by and with the Advice and Consent of the Senate shall appoint Ambassadors, other public Ministers and Consuls ... and all other Officers of the United States.

—He shall receive Ambassadors and other Public Ministers.

—He shall take care that the Laws be faithfully executed and shall Commission all the Officers of the United States.

The President also has the veto which can be overridden only by a two-thirds vote of both House and Senate, a power which in the twentieth century has led the President to be called the chief legislator as well as the Chief Executive.

THE CONSTITUTION AND NATIONAL SECURITY:
A BICENTENNIAL VIEW

Composed in 11 on 13 point Baskerville with 14 point letter-spaced heads with Helanna Script
Cover art prepared by Rhonda Story
Book design by Janis Bren Hietala

THE CONSTITUTION AND NATIONAL SECURITY:
A BICENTENNIAL VIEW

"We find ourselves in the uneasy situation where both executive and legislative leadership have eroded badly. In weakened condition, the leaderships at both ends of Pennsylvania Avenue need to help each other more than ever; instead, we find unending bickering over the most crucial issues of the day—control over the budget, war powers, and nuclear armaments."

—Edmund S. Muskie

* * *

"The adversarial relationship between the Congress and the President which results from our system of checks and balances and the separation of powers has proved to be of the utmost value in preventing the abuse of power by either branch of government."

—Edwin Timbers

* * *

"In general, the fashion is to deplore the involvement of Congress in foreign policy-making and to see such recent congressional initiatives as the War Powers Resolution and the Angola Resolution and the difficult struggles over MX and the Panama Canal Treaty and SALT II as inappropriate exercises of congressional power."

—Nelson W. Polsby

* * *

"The distribution of power that the constitutional framers apparently intended has not been changed by amendment, but it is difficult to recognize in that blueprint the roles of the political branches as we see them played today. It is particularly difficult to see in the constitutional text the powers of the President which, Harry Truman once said, are such as would make Genghis Khan blush with envy."

—Louis Henkin

* * *

"In effect, what the republican form of government and the idea of consent did was to legitimize political inequality."

—Gregory D. Foster

NATIONAL DEFENSE UNIVERSITY PRESS
Fort Lesley J. McNair
Washington, DC